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COLLECTION
OF
Acts and Records of Parliament,
WITH
Reports of Cases
ARGUED AND DETERMINED
IN THE
Courts of Law and Equity,
RESPECTING
T I T H E S,

By **HENRY Gwillim, Esq.**
ONE OF HIS MAJESTY'S JUDGES
OF THE SUPREME COURT AT MADRAS.

IN FOUR VOLUMES.
VOL. I.

LONDON:
PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,
FOR J. BUTTERWORTH, FLEET-STREET.

1801.

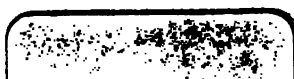


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script : where I have omitted to notice it, it is not because I do not think the report of equal authority and entitled to equal credit with the others, but because it was communicated to me with an injunction to conceal the source whence I derived it. An intelligent reader will not want to know the historian to enable him to appreciate the merits of the history : the profession will not require me to betray the confidence reposed in me, in order to satisfy the curiosity of men whose opinions are determined by the accident of a name.

I had some doubts, whether I should insert in the collection any other than the manuscript cases, whether I should introduce those reports which are already in print, and are to be found in most of the law-books. I was fearful, that it might be objected, that I was offering to the publick what they were already in possession of, and calling upon them to pay again for the same thing in a somewhat different shape. But, upon consulting with men, whose opinions I revered, (and their opinions were peculiarly entitled to respect in a case of this kind, for they were neither authors nor bookfellers,) I was advised to make my collection as full as possible. It seemed to them, that it would be wrong to confine myself only to those detached portions of history, which had hitherto lain in manuscript ; that there was an awkwardness in partial reference and partial detail ; and that I should render a service not altogether unacceptable to the profession (for I should save them much manual labour and muscular exertion)

ertion) if I were to present to them in a commodious form the several cases upon the subject of Tithes, which lie dispersed in many a cumbrous folio. I have acted in obedience to that advice ; and in the following pages the reader will find, with much of novelty, much that he has already read, and may already possess. It was my object to make a *whole* ; and whilst the whole consists of all its parts, I cannot compliment the reader with a rejection of some of the parts, when I give him the whole.

I have to regret, that the marginal abstracts of the cases are not always entitled to that credit which they ought to carry with them. Those will, in general, be found, I believe, the most faulty, which are affixed to the cases extracted from the printed books. The truth is, that too easy admission was given to what had been already published ; and from the want of due examination, the looseness or inaccuracy of the statement was not discovered until it was too late to correct it. However, I am confident, that these defects will be amply supplied in the index, the care of preparing which is devolved upon a Gentleman of extensive legal information and great critical exactness. He will, no doubt, seize many points which have escaped me, and retrace passages which I have left too faintly marked.

The tract which I intend to prefix to these volumes will, I hope, be ready for publication in no very great length of time. A part of it is actually printed ; and I am not aware

of any other obstacles than those which the elements, a tropical climate, or the accidents of war, may raise, that are likely to interrupt the completion of it. The work has hung longer than it ought to have done, since I gave the profession reason to expect it, and I have to apologize to them for the delay. I am not, however, conscious that much of that delay, great as it has been, can be fairly imputed to me. It was not a matter of a day to collect the manuscripts which I have been favoured with, as they lay in many hands. The communications were not always obtained with equal facility. My applications were sometimes silenced by the deep tones of business, and sometimes waved by the civil apologies of gentlemanly indolence. I had sometimes to hear from clerks that their masters were inaccessible, except to clients; I had sometimes to excuse myself for intruding upon men who had nothing to do. It is, surely, not to be wondered at, if I was occasionally disconcerted; if languor succeeded to disappointment, and I became indifferent to a work, about the prosecution of which the world shewed no concern. But this was not the only cause which contributed to check its progress. It seemed to little purpose to state and discuss the law, when the subject-matter itself was threatened with annihilation; when men were industriously taught to believe that agriculture would derive vigour from the abolition of Tithes, and the state would find resources in their ruins. A bold financial policy, favoured by the indifferency of a great part of mankind to every thing connected with religion, and supported by the zeal of
sectarism,

sectarism, the wiles of interest, and the prejudices of ignorance—at the view of such a combination acting at a most alarming juncture, amidst the distresses of war and of scarcity, I will confess, I have often thrown down my pen, and desisted from the pursuit of an inquiry, which seemed to be fruitless.

HENRY GWILLIM.

Portsea,
March 2, 1801.

A C T S
AND
RECORDS OF PARLIAMENT
RELATING TO
T I T H E S,
&c. &c.

The Statute of *Circumspectè Agatis*, made 13 E. I.
& A. D. 1285. Stat. 4. c. 1.

Certain Cases wherein the King's Prohibition doth not lie.

THE king to his justices, greeting:—Use yourselves circumspectly in all matters concerning the bishop of *Norwich* and his clergy, not punishing them if they hold pleas in court christian of such things as are merely spiritual; (to wit),

1285.

If a parson demand tithes, greater or smaller, so that the fourth part of the value of the benefice be not demanded.

Item, If a parson demand mortuaries in places where a mortuary hath been used to be given.

In these cases the ecclesiastical judge hath cognizance, notwithstanding the king's prohibition.

The lord the king answered to these articles, that in tithes, obventions, oblations, mortuaries, when the question is as aforesaid, there is no room for a prohibition. But, if a clerk or religious person shall sell his tithes to any one for money after they are gathered into his barn or any where else, and plea be holden thereof in the spiritual court, the king's prohibition hath place; because by the sale the things spiritual become temporal, and so the tithes pass into chattels.

1285.

Item, If debate arise upon the right of tithes having its origin in the right of patronage, and the quantity of those tithes exceed the fourth part of the benefice, the king's prohibition hath place.

Stat. 9 E. II. (*Articuli Cleri*), c. 1. A. D. 1315.

No Prohibition shall be granted where Tithes are demanded, but where Money is paid for them.

FIRST, Whereas laymen purchase prohibitions generally, upon tithes, obventions, oblations, mortuaries, redemption of penance, violent laying hands on clerks or converts, and in cases of defamation, in which cases spiritual penance ought to be enjoined; the king doth answer to this article, that in tithes, oblations, obventions, mortuaries (when they are propounded under these names) there is no ground for the king's prohibition, although, for the long withholding of the same, the money may be esteemed at a sum certain. But, if a clerk or a religious man sell his tithes, being gathered in his barn, or in any other place, to any man for money, if the money be demanded before a spiritual judge, the king's prohibition lies, for by the sale the spiritual goods are made temporal, and the tithes turned into chattels.

c. 2. Debate upon the Right of Tithes exceeding the fourth Part.

ALso, if debate arise upon the right of tithes having its original in the right of the patronage, and the quantity of the same tithes amount to the fourth part of the goods of the church, the king's prohibition holdeth place, if the cause come before a judge spiritual.

c. 5. No Prohibition where Tithe is demanded of a new Mill.

ALso, if any one erect in his ground a mill of new, and after the parson of the same place demand tithe for the same, the king's prohibition issues in this form: *Quia de tali molendino hactenus decimæ non fuerunt solutæ prohibemus, &c. Et sententiam excommunicationis, si quam hac occasione promulgaveritis, revocetis omnino.*

The Answer.—In such case the king's prohibition was never granted by the king's assent, who decrees that it shall not hereafter lie in such cases.

Rot.

1343.

Rot. Parl. 17 E. III. N° 29. A. D. 1343.

THE commons pray, that no man be drawn in plea in court christian for tithes of wood or underwood, except in places where such tithes have used to be paid. Tithe of wood.

Answer.—Let it be done of this as it hath been done heretofore.

A Statute of the Clergy, made 18 E. III. & A. D. 1344. Stat. 3. c. 7. Rot. Parl. N° 7.

No *Scire Facias* shall be awarded against a Clerk for Tithes.

ITEM, Whereas writs of *scire facias* have been granted to warn prelates and religious and clerks, to answer tithes in our chancery; and to shew if they have any thing, or can any thing say, why such tithes should not be restored to the demandants; and to answer, as well to us as to the party of such tithes: that such writs as aforesaid henceforth be not granted; and that the process pending upon such kind of writs, be annulled and repealed; and that the parties be entirely dismissed from before the secular judge of such manner of pleas as aforesaid; saving to us our right, such as we and our ancestors have had, and were wont to have of reason.

Rot. Parl. N° 9. *Eodem Anno.*

THE commons pray, that as a constitution is made by the prelates to take tithes of all manner of wood, which thing was never used, and that niefs and wives might make testaments, which is against reason; that it would please the king, by him and his good council, to ordain a remedy, and that the people should remain in the same state as they have used to be in the time of all his progenitors, and that prohibitions should be granted to all those who are empleaded of the tithes of wood, without having a consultation. Of tithe of wood. This petition in Mr. Serjeant Rolle's Abridgement is No. 12.

Answer.—The king wills that law and reason be done.

Rot. Parl. 21 E. III. N° 48. A. D. 1347.

THE commons shew, that lately the archbishop of *Canterbury*, and the other prelates, ordained a constitution to give tithes of underwood sold only, whereas before this time no tithes thereof were given; and now the men of holy church, by force of the constitution, Tithe of wood.

1347.

constitution, take and demand tithes, as well of great wood as of underwood, sold and not sold, against what they have used from time immemorial, to the great damage of the commons; wherefore they pray remedy in each point.

Answer.—The archbishop of *Canterbury*, and the other prelates, have answered, that such tithe is demanded by reason of the aforesaid constitution, only of underwood.

Rot. Parl. 25 E. III. N° 27. A. D. 1351-2.

Of tithe
of wood.

THE commons pray, that if the clergy, in right of tithes of highwood and underwood, or of any other thing, demand or attempt any thing new, but only that, and in those places, whereof they have been of old time seised in right of their churches; that it may please our lord the king to grant a prohibition thereof, without a consultation, to all those who will ask it in such case; and that the said people of holy church be forbidden to demand tithes of grofs wood.

Answer.—The king and his council will advise of this petition.

Rot. Parl. 43 E. III. N° 17. A. D. 1369.

Of tithe
of wood.

THE commons pray, that it be declared in what case tithe of wood and of underwood ought to be given of right, in places where it hath not been given heretofore; and also that it be put in certain, what manner of wood ought to be called *silva cadua*; and in case any one be empleaded in court christian of the tithe of wood or underwood, that a prohibition be granted thereafter, and an attachment thereupon in chancery, as well to the judges as parties, as is customary in other cases, without having a consultation.

Answer.—Let the statute in this case ordained be kept and holden.

Stat. 45 E. III. c. 3. A. D. 1371.

A Prohibition shall be granted where a Suit shall be commenced in the Spiritual Court for *Silva Cadua*.

A prohibition shall be granted where a suit is commenced in the spiritual court for *silva cadua*.

ITEM, at the complaint of the said great men and commons, shewing by their petition, that whereas they sell their great wood of the age of twenty years, thirty years, forty years, or of greater age, to merchants to their own profit, and in aid of the king in his wars, parsons and vicars of holy church emplead and draw

draw the said merchants in the spiritual court for the tithes of the said wood, in the name of these words called *silva cadua*, whereby they cannot sell their woods to the very value, to the great damage of them, and of the realm*: It is ordained and established, that a prohibition in this case shall be granted, and upon the same an attachment, as it hath been used before this time.

1371.

* The record at this part "prays the king and his council,

that he will apply a suitable remedy to this, and openly declare and interpret these words *silva cadua*, as, in the understanding of the commons, underwood is comprized in these words *silva cadua*, and not trees of such age."

Rot. Parl. 47 E. III. N° 9. A. D. 1373.

ALL the commons of the realm pray, that whereas at the last parliament holden at *Winchester*, the lords and commons of the land made their complaint, that parsons and vicars of holy church travailed them in court christian for the tithes of great wood, that is to say, of the age of 20 years and above, by colour of this word *silva-cadua*; at their request it was ordained, that no wood that was or should be of the age of 20 years and more, should be tithable; and the parsons of holy church intending that this ordinance doth not restrain them of their ancient encroachment, surmising that this was never affirmed for a statute, make citations in court christian against the ordinance aforesaid, to the great damage of the people; wherefore may it please our said lord the king to affirm the said ordinance for a statute to endure for the time to come; and that a special prohibition upon the same statute be made thereof in chancery, forbidding them to hold plea in court christian of tithes of wood of the age aforesaid.

Tithe of wood,

Answer.—Let there be such prohibition granted as hath been used of ancient times.

Rot. Parl. 50 E. III. N° 141. A. D. 1376.

THE clergy pray, that although tithe of wood, especially of *silva cadua*, is payable to God and the church of divine and ecclesiastical right; yet, where the question before the ecclesiastical judge is merely upon the tithe of *silva cadua*, the king's prohibitions are directed to the party and the judge, and the due and long accustomed consultations are not granted, but are too much restrained by clauses now of late subtilly invented against justice, so that the ecclesiastical judges, having conuzance in causes of *silva cadua*, from the dread of such clauses so lately inserted as aforesaid in consultations of this kind, will not dare to proceed; and although

Tithe of wood.

1376. though a sufficient consultation be granted, such as was wont to be granted anciently, a prohibition similar to the first is obtained again upon the same matter : and nevertheless, if afterwards a second consultation being previously obtained, the judge proceed any farther in the cause, an attachment is given against the judge, the advocate, and the party, notwithstanding such last consultation : wherefore the same clergy pray, that in a cause of *silva cædua*, due and customary consultations be granted without any difficulty and restriction whatsoever ; that the aforesaid attachment, or any other molestation or disturbance in the secular court, cease, even after the first consultation granted ; and that it may be lawful for the ecclesiastical judge after that, notwithstanding the king's prohibition may be afterwards obtained, to proceed with impunity, without offence to the king's majesty, and freely, without first obtaining another consultation.

Answer.—One consultation granted is sufficient by the law in the same cause or plaint ; and if it be necessary, they shall have a special clause for prohibitions made, or to be made.

Rot. Parl. N^o 203.

ITEM, In tithe causes it is sometimes objected, that the tithes exceed the fourth part of the value of the church, and thereupon the king's prohibition is obtained, and thereby the secular court hath conuance in a cause of tithes notoriously against the laws.

Rot. Parl. N^o 205.

ITEM, If any one be drawn before the secular judge upon tithes under the name of chattels, and, being so drawn, he propound before the secular judge that they are tithes, and not chattels ; let the ecclesiastical judge, not the secular judge, decide this, and terminate the question.

[*It seems rather doubtful whether any answer was given to either of these petitions.*]

Rot. Parl. 51 E. III. N^o 80. A. D. 1376-7.

THE clergy pray, that whereas the tithes of wood called *silva cædua*, are to be paid to God and holy church of divine right and the right of holy church, nevertheless, where process is hanging of such kind of tithes before judges of holy church, the king's prohibitions are directed to the judges and parties, and the consultations
due

due and according to the laws of holy church, as in the articles and petitions following is more fully contained, are not granted; wherefore the said prelates and clergy pray, that in cases of tithes of such manner of *silva cædua* due consultations be granted, without any difficulty whatsoever.

Answer.—Let the law thereof be used as heretofore it hath reasonably been.

Stat. 1 R. II. c. 13. Rot. Parl. N° 118.
A. D. 1377.

Ecclesiastical Judges shall not be vexed for Suits for Tithes in a Spiritual Court.

THE prelates and clergy of this realm greatly complain that the men of holy church, and others, suing for their tithes, and other things, in the spiritual court to which such causes ought, and were wont to pertain, and the judges of holy church, having cognisance in such causes, and other persons intermeddling therein according to law, be maliciously and unduly for this cause indicted, imprisoned, and by secular power horribly oppressed, and also enforced with violence by oaths and grievous obligations, and many other means unduly compelled to desist and cease utterly in the things aforesaid, against the liberties and franchises of holy church: wherefore it is assented, that all such obligations made, or to be made, by duress or violence, shall be of no value. And as to those that by malice procure such indictments, and to be the same indictors, after the same indictees be so acquit, such procurers shall have and incur the same pain that is contained in the statute of *Westminster* the second, of those which procure false appeals to be made. And the justices of assises, or other justices, before whom such indictees shall be acquit, shall have power to inquire of such procurers and indictors, and duly to punish them according to their desert.

c. 14. Rot. Parl. 121. *Eodem Anno.*

In an Action of Goods taken away, the Defendant maketh Title for Tithes due to the Church.

ITEM, It is accorded, that at what time that any person of the holy church be drawn in plea in the secular court for his own tithes taken by the name of goods taken away, and he who is so drawn in plea make an exception, or allege that the matter, substance,

1377.

stance, and source of the business is only upon tithes due of right and of possession to his church, and not otherwise any goods and chattels; that in such case the general averment shall not be taken without shewing specially how the same was his lay-chattel.

Rot. Parl. N^o 121. *Eodem Anno.*

Tithe of
wood.

THE clergy pray, that all manner of tithe of wood called *silva cædua*, due to God and holy church, be lawfully paid. And in case the king's prohibition be delivered to the judge, or party, in a cause upon such kind of tithe, that a full and plenary consultation, without any new or undue restitution in this behalf be forthwith granted; and that the judges proceeding, the parties pursuing, and all others whosoever doing their duty on this part, be not for this cause hindred or aggrieved by indictments, imprisonments, condemnations, or in any other manner whatsoever.

Answer.—Let it be done in this case as hath been used before these days.

Rot. Parl. 2 R. II. N^o 19. A. D. 1379.

Tithe of
wood.

THE commons shew, that great mischief is done by persons of holy church who demand tithes of all manner of wood, by colour of *silva cædua*, and wrongfully haraß them in divers parts of the kingdom, by grievous summonses before judges of holy church, so that by such summonses and grievances they pay tithes of great trees, and also for timber which they fall for the repairing of their houses, and for fuel, whereas they were not wont nor ought to pay them of right; but the said commons, from not being able, and from the great favour which the said persons of holy church have before the judges, and for that the judges are parties in such cases, submit to the wrong, in order to avoid greater mischief in future, which has often been done to the said commons heretofore: wherefore they pray remedy, that *silva cædua* be declared in other manner than the clerks have heretofore declared it for their profit, without the assent of the lords, and that it be ordained to be of underwood, or wood of a certain age under ten years; (for before the first pestilence* no tithes of any manner of wood were given, granted, or demanded); and that thereupon every man may have a prohibition upon his case; for those of the chancery intend, that of whatsoever age the wood may be, if tithe thereof be required, a prohibition doth not lie thereupon.

* A. D.
1349.

Answer.—Be it used as it reasonably hath been before this time.

7 R. II.

7 R. II. A. D. 1384.

1384.

IT was agreed before the king's council, in a parliament holden at *Salisbury*, that consultations ought to be granted of *filva cadua*, notwithstanding it is not renewed annually. And thereupon a consultation was awarded for the abbot of *Notley*, in a case of *filva cadua*.

Reg. 69. 2.
To what
parliament
to refer this
agreement
Mr. Selden
knows not,
unless to

that of 7 R. II. holden at Salisbury, the rolls whereof have nothing of it.

Rot. Parl. 8 R. II. N° 21. A. D. 1384.

THE commons pray, that whereas it is ordained by statute, that a general prohibition shall be granted in chancery, wherever men advanced to benefices of holy church demand tithes in court christian of great wood which is passed the age of twenty, thirty, or forty years, when such wood is cut and sold; and because no special prohibition is granted by the said statute, the said men of holy church sue in court christian for the tithes aforesaid, notwithstanding such general prohibition directed to them, to the great damage and mischief of those who sell their wood in the form aforesaid; may it please our lord the king, to grant a special prohibition, with attachments thereupon, against the ordinaries and those who sue against the statutes as aforesaid.

Tithe of
wood.

Answer.—Be it done as was heretofore ordained by the statute made at *Westminster*, in the 45th year of the reign of our grandfather, whom God have mercy upon.

Rot. Parl. 14 R. II. No. 29. A. D. 1390.

THE commons of the land pray, that whereas parsons and vicars claim and demand of the said commons tithes of wood, that is, as well of wood of the age of 40 or 60 years, as of the age of 9 or 10 years, and sue and emplead them in court christian, to the great travail, cost, and loss of the said commons, notwithstanding the statute before these times thereof ordained, by reason that the words *filva cadua* are not expounded nor declared in certain; may it therefore please our lord the king to ordain, that the said words *filva cadua* may be declared, determined, and ascertained, that the country, which hath been duly tithable from the 20th year of king *Edward*, since the conquest, be charged with such tithes according to the tenor of a statute thereof made before

Tithe of
wood.

1390. fore these days, and not otherwise, so that the said commons may be certain of what manner of wood they ought to pay tithes, at the final discussion of the aforesaid debates.

Answer.—Be it as it hath been heretofore.

Stat. 15 R. II. c. 6. Rot. Parl. N° 38.

A. D. 1391.

In Appropriation of Benefices there shall be Provision made for the Poor and the Vicar.

BECAUSE divers damages and hindrances oftentimes have happened, and daily do happen to the parishioners of divers places, by the appropriation of benefices of the same places; it is agreed and assented, that in every licence henceforth to be made in the chancery, of the appropriation of any parish church, it shall be expressly contained and comprised, that the diocesan of the place, upon the appropriation of such churches, shall ordain, according to the value of such churches, a convenient sum of money to be paid and distributed yearly of the fruits and profits of the same churches, by those that will have the said churches in proper use, and by their successors, to the poor parishioners of the said churches, in aid of their living and sustenance for ever; and also that the vicar be well and sufficiently endowed.

Rot. Parl. N° 44. *Eodem Anno.*

Tithe of
wood.

THE commons pray, that whereas in many parts of the realm divers persons are sued, travailed, and put to great costs, and some are excommunicated in court christian for tithes of great trees as well as of seasonable wood, under colour of this word *silva-cædua*; that it may please our lord the king, and the very sage lords of this parliament, that this word *silva-cædua* be declared, and the age of wood tithable be ascertained, in this present parliament, in ease of the said commons, considering that divers bills upon this matter have been inserted in the petitions of the commons in several parliaments before these days, and no remedy is ordained.

Answer.—Be it used as it hath been used heretofore.

Stat.

Stat. 2 H. IV. c. 4. A. D. 1400-1.

The Penalties for the purchasing of Bulls to be discharged of Tithes.

FOR as much as our lord the king, upon grievous complaint to him made in this parliament, hath perceived, that the religious men of the order of *Cisterciens* in the realm of *England* have purchased certain bulls to be quit and discharged to pay the tithes of their lands, tenements, and possessions let to farm, or manured, or occupied by other persons than by themselves, in great prejudice and derogation of the liberty of holy church, and of many liege people of the realm; our lord the king, willing thereupon to ordain remedy, by the advice and assent of the lords spiritual and temporal, and at the instance and request of the said commons, hath ordained and stablished, that the religious persons of the order of *Cisterciens* shall stand in the estate that they were before the time of such bulls purchased; and that as well they of the said order, as all other religious and seculars, of what estate or condition they be, who put the said bulls in execution, or from henceforth purchase other such bulls of new, or by colour of the same bulls purchased, or to be purchased, take advantage in any manner, that process shall be made against them, and every of them, by garnishment of two months by writ of *præmunire facias*; and if they make default, or be attainted, then they shall incur the pains and forfeitures contained in the statute of provisors, made the thirteenth year of the said King *Richard*.

Rot. Parl. N^o 51. *Eodem Anno*.

THE commons pray, that no appropriation of any church be henceforth made; and that he who enjoys such appropriation in future, incur the penalty contained in the statute of provisors; except that religious or any other persons whosoever who have possessions in mortmain, may exchange and give such possessions so in mortmain to secular hands, in order to have such benefice appropriated with the licence of the king, the patron, the lord, and the founder.

Of appropriations of churches.

Answer.—The king will advise upon it.

Rot.

1400-1.

Rot. Parl. N° 59. *Eodem Anno.*Of tithe of
wood.

THE commons [*after reciting the statute of 45 Edw. III.*] say, that notwithstanding this statute, parsons and vicars of holy church claim tithes of all manner of wood as they were wont to do before, because consultations in this case in chancery have so easily been granted by colour of these words *silva cædua*; they therefore pray, that the king would please to ordain, that no consultation be granted by these words *silva cædua*, if it be so that the wood of which tithes are claimed be of the age of 20 years or more at the time of cutting; and that a penalty be thereupon ordained in this present parliament.

Answer.—Be it used as it hath been used before these days.

Rot. Parl. N° 93. *Eodem Anno.*Agistment
tithes.

ITEM, Priount les communes, q par la ou diverses gentz de seinte esglise empledont plusieurs lieges du roialme en court christian pur dysmes d'engyementz de certains terres, prees, pastures, & vastes, lesqueux ne ount my este dismes d'engyement devant ces heurs; cestassavoir, des terres semez & prees mesme l'an apres ceo qu'ils ount pris lour dismes des blees & de fyn, & des pastures & vastz, queux ount este dismes d'engyementz a nul temps, la ou les ditz perones de seinte esglise nount leur dismes continuelment de les agnelez, velez, & autres tieux maneres de dismes avenantz & esteantez sur les ditz terres, prees, pastures, & vastez, a graunt damage & disseise si b'n a seignrs come altres pour tenants de les commons du roialme:

ITEM, The commons pray, that whereas divers men of holy church emplead many liege subjects of the realm in court christian for tithes of agistment of certain lands, meadows, pastures, and wastes, which have not been tithable of agistment before these days; that is to say, of lands sown and meadows the same year after they have taken their tithes of corn and hay, and of pastures and wastes, which have at no time been tithable for agistment, where the said persons of holy church take their tithes continually of lambs, calves, and other such manner of tithes coming and being upon the said lands, meadows, pastures, and wastes, to the great damage and disseisin, as well of lords as of others, poor tenants of the commons of the realm; May it please our

roialme : Que plese a nre
 ur le roy, en cest present par-
 lement, pur faire declaration,
 lequel les ditz dismes d'engesse-
 ment seront paiez ou non ; &
 pour ordiner prohibition ou autre
 due remede encontre les perſones
 de ſainte eglise, queux ſervont
 tieux ples en court cristiane en-
 coudre aucun de les lieges le roy,
 encoudre droit, ley, & reſon.

Reſponſio.—Celluy q̄ ſoy ſeente
 greve ſue en eſpecial.

our lord the king, in this present
 parliament, to make declaration,
 whether the ſaid tithes of agiſt-
 ment ſhall be paid or not, and
 to order a prohibition or other
 due remedy againſt the perſons
 of holy church, who ſhall ſerve
 ſuch pleas in court chriſtian
 againſt any of the liege ſubjects
 of the king, againſt right, law,
 and reaſon.

Answer.—Let him who ſhall
 find himſelf grieved ſue ſpecially.

1400-1.

Stat. 4 H. IV. c. 12. A. D. 1402.

In Appropriations of Benefices Proviſion ſhall be made for the
 Poor and the Vicar.

IT is ordained, that the ſtatute of appropriation of churches,
 and of the endowment of vicars in the ſame, made the fifteenth
 year of king *Richard* the ſecond, be firmly holden and kept, and
 put in due execution ; and if any church be appropriated by licence
 of the ſaid king *Richard*, or of our lord the king that now is,
 ſithence the ſaid fifteenth year, againſt the form of the ſaid ſtatute,
 the ſame ſhall be duly reformed according to the effect of the ſame
 ſtatute, betwixt this and the feaſt of *Eaſter* next coming. And if
 ſuch reformation be not made within the time aforeſaid, that the
 appropriation and licence thereof be made void, and utterly repealed
 and adnulled for ever ; except the church of *Hadenham* in the
 dioceſe of *Ely*, which, for to eſchew divers damages, diſcords, and
 debates, that have been before this time betwixt the biſhop of *Ely*
 and the archdeacon of *Ely*, upon the exerciſe of their juriſdiction,
 (as it was openly declared by the ſame biſhop in preſence of the
 king, and of the lords in parliament), was of late appropriated, by
 the licence of the king our lord, to the archdeacon and his ſucceſ-
 ſors to do divine ſervice, keep hoſpitality, and to ſupport other
 charges as pertaineth. Moreover it is ordained and ſtabliſhed, that
 all the vicarages united, annexed, or appropriated, and the licences
 thereof had after the firſt year of the ſaid king *Richard*, how well
 ſoever that they who have united, annexed, or appropriated ſuch
 vicarages,

1414.

grandfather of the lord the now king, in the 45th year of his reign, it is contained, that a prohibition be granted in this case, and thereupon an attachment, as it hath been used before these days; by which statute no full declaration is made what wood is tithable, and what not, wherefore the justices of the land are of different opinions upon this matter; that it please our lord the king to limit and ordain, by the advice of the lords of this present parliament, that all manner of wood, which is of the age of 20 years or more, shall not be tithable in any manner for the time to come; and if it be under the age of 21 years it shall be tithable, if the custom of the country, where such wood is growing, demands it, and that in this case there be a prohibition, and thereupon an attachment, without granting a consultation.

Answer.—Because the matter of the petition requires great and mature deliberation and declaration, the king wills, that the said matter be adjourned, and remitted to the next parliament; and that the clerk of the parliament cause this article to be brought before the king and lords at the beginning of the next parliament, in order that a declaration may be had thereupon.

Rot. Parl. 2 H. V. N° 9. A. D. 1414.

An Act for suppressing the Alien Priors.

THE commons pray, that in case final peace should hereafter be made between you our sovereign lord and your enemy of *France*, and thereupon all the possessions of the alien priories in *England* should be restored to the chief houses of the religious abroad, to which those possessions are belonging, damage and loss would come to your said kingdom, and to your people of the same kingdom, by the great rents and revenues which, from year to year ever afterwards, would be remitted from the said possessions to the chief houses aforesaid, to the very great impoverishment of the same your kingdom in this behalf, which God forbid; may it please your most noble and most gracious lordship, for the consideration aforesaid, and also in consideration that, at the beginning of the war between the two kingdoms, your liege subjects were, by a judgement given in the kingdom of *France*, for ever ousted and disinherited of all the possessions which they then had of the gift of your noble progenitors in the parts abroad within the jurisdiction of *France*, most graciously to ordain in this present parliament

ment, by the assent of your lords spiritual and temporal, that all the possessions of the alien priories, situate in *England*, may remain in your hands to you and your heirs for ever, to the intent that divine services may henceforth be more duly celebrated in the aforesaid places by *Englishmen*, than they have hitherto been by *Frenchmen*.

1414.

Provided, that the possessions of the conventual alien priories, and of the priors who are inducted and instituted, and also all the alien possessions given by the most gracious lord the king your father, whom God have mercy upon, to the master and college of *Fotheringay*, and their successors, of the foundation of the said lord the king your father, and of *Edward* duke of *York*, notwithstanding the peace to be made, if any should be, together with all manors, franchises, and liberties, by our said lord the king your father granted to the said master and college, and their successors, and by you confirmed, may perpetually remain by the authority of this present parliament to the said master and college, and to their successors, to the use and intent, according to the tenor and purport of the letters patent of our said lord the king your father, of the foundation of the said college, without any charge or profit to you most sovereign lord, and your heirs, or to any other person or persons, saving the services due to the lords of the *English* fees, if any there be, notwithstanding the said grant made by our aforesaid lord the king your father, to the said master and college, and their successors, extend only during the war between you, most sovereign lord, and your enemy of *France*; and saving also to every one of your liege subjects, as well spiritual as temporal, the estate and possession which they have at present in any of such alien possessions, whether they have purchased, or are to purchase them in perpetuity, or for term of life, or for term of years, of the chief houses abroad, by the licence of our lord the king your most noble father, whom God have mercy upon, or of king *Edward* the third, your great grandfather, or of king *Richard* the second, since the conquest, or of your own gracious gift, grant, confirmation, or licence, now had in that behalf, paying and supporting all the charges, pensions, annuities, and corrodies, granted to any of your liege subjects by you, or any of your noble progenitors, to be taken out of the possessions or alien priories aforesaid.

Answer.—The king wills it: and also that the said master and college of *Fotheringay* have an exemplification from the king, under

1414. his great seal, of this petition, for their greater security in this behalf, and that with the assent of the lords spiritual and temporal, in this present parliament assembled.

Rot. Parl. 10 H. VI. N^o 12. A. D. 1432.

Appropriation of churches.

THE commons, after reciting in their petition the statute of 4 H. IV. proceed thus, "and forasmuch as in that statute no penalty is imposed upon those who have churches to their own use, in case they suffer the vicarages therein to be inofficiate, and therefore in several parts of the kingdom they have suffered the said vicarages, by the insufficient endowment thereof, and for their own gain, to be inofficiate and void for several years, by reason whereof, in many parishes in the kingdom, old men and women have died without confession, or receiving any other sacrament of holy church, and infants have died without baptism, whereby several mischiefs and inconveniencies from day to day happen, to the great dishonour of holy church;" they pray therefore, "That it may be ordained by this present parliament, that if any religious or man of holy church, of what estate or condition soever he be, who have or hold any churches to their own use, hereafter suffer the vicarages of such churches to be inofficiate, without a resident vicar thereon, for six months; that the same churches so holden to their own use, with all their appurtenances and dependencies, be absolutely disappropriated and disamortised for ever, saving only to the said religious and men of holy church their patronage therein, as they had before any appropriations were made of the said churches, or they were holden to their proper use, without having or retaining any pension, portion, annuity, or other charge whatsoever, and saving to the ordinaries their right by lapse.

Answer.—The king will advise upon it.

Rot. Parl. *Eodem Anno.* N^o 17.

Gratwood.

In the 11 H. 6. Rot. Parl. No. 14. there is a like petition almost in the same words, to which the answer is, "The king will advise upon it."

THE commons, after reciting in their petition the statute of E. III. say, That now so it is, that divers liege subjects of our lord the king are empleaded and travailed in court christian for tithes for the said causes, who thereupon come into the chancery of our lord the king, in order to have a writ of prohibition and of attachment according to the effect of the said statute, which writs are denied to them, against law and right; wherefore that it may please our lord the king, by the advice and consent of the lords spiritual and temporal, in this present parliament, to ordain, by the authority

authority of the same parliament, that those persons who feel themselves aggrieved against the ordinance of the said statute, may have writs of prohibition and attachment thereupon, according to the effect of the said statute; and in case any such prohibition or attachment be denied to any of his liege subjects in the chancery of our lord the king, that then such writs of prohibition and attachment be granted as well in the bench of our lord the king, as in the common bench; and that the writs of prohibition and attachment issuing out of those benches may have the same force and effect, as the original writs of prohibition and attachment so issuing out of the chancery of our lord the king.

1432.

Answer.—Let the statute before made be kept and executed according to the tenor thereof.

Rot. Parl. 19 H. VI. P. 1. M. 30. *Rymer's Fœdera*,
Vol. X. P. 802. A. D. 1440.

Grant of the Alien Priors in Fee.

THE Lord King to all to whom, &c. Health.—Know ye that we fully confiding in the fidelity and circumspection of the venerable fathers in Christ, *Henry* (a) archbishop, *John* (b) bishop of *Bath and Wells*, *John* (c) bishop of *St. Asaph*, and *William* (d) bishop of *Salisbury*, and of our beloved and faithful cousin *William* earl of *Suffolk*, and also of our beloved *John Somerseth*, *Thomas Bekyngton*, *Richard Andrewe*, *Adam Moleyns*, clerks; *John Hampton*, *James Finys*, esquires; and *William Tresham*; and by reason of the great confidence which we place and have in the aforesaid persons, have given and granted to them all those priories, manors, lands, tenements, rents, services, pensions, portions, apports, and possessions, being within our kingdom of *England* and *Wales*, and the marches of *Wales* aforesaid, (which are called the late priories and possessions of aliens), lately appertaining or belonging to any religious house or houses in parts beyond the seas, and in our hands now being: To have and to hold to them, their heirs and assigns, of us and our heirs, by fealty only, for all services, burthens, exactions, and demands, from the feast of *Easter* last past for ever, together with the advowsons of all the said priories, rectories, churches, vicarages, chapels, chantries, hospitals, and other ecclesiastical benefices, which are now called, or lately were called, the priories and possessions of aliens, being within our said kingdom of *England* and *Wales*, and the marches of *Wales* aforesaid, lately appertaining and belonging to any such house or

(a) Henry
Chicheley.
(b) John
Lect.
(c) John
Stafford.
(d) William
Ailcoth.

1440.

houses in the said parts beyond the seas; together also withall knights' fees, franchises, and liberties whatsoever, to the said premises, or any of them, in any manner belonging or appertaining.

We have granted also to the said archbishop, bishops, earl, *John, Thomas, Richard, Adam, John, James, and William*, all and singular rents and farms, which any person or persons is or are bound to render to us for any such priories, manors, lands, tenements, rents, services, pensions, portions, apports, and possessions whatsoever: To have and to hold the same rents and farms, together with the reversions as well of the said priories, manors, lands, tenements, rents, services, pensions, portions, apports, and possessions, when they shall happen, or may or ought to come in any manner to our hands, or the hands of our heirs, as of any other priories, manors, lands, tenements, rents, services, pensions, portions, apports, and possessions, within our kingdom of *England* and *Wales*, and the marches of *Wales* aforesaid, which are now, as is aforesaid, called, or lately were called, the priories and possessions of aliens, lately belonging or appertaining to any religious house or houses in the said parts beyond the seas, which any person or persons holds, hath, or occupies, hold, have, or occupy, for term of life by the curtesy of *England*, or in dower, or in fee-tail, or otherwise for term of years, of our own grant or demise, or of the grant or demise of any of our progenitors, and which, by or after the decease of the said person or persons, or of any other person, or by any other means, may and ought to come, fall, revert, or remain, to and in our hands, or the hands of our heirs, to the said archbishop, bishops, earl, *John, Thomas, Richard, Adam, John, James, and William*, their heirs and assigns, from the feast aforesaid for ever, of us and our heirs, by fealty only for all services, exactions, and demands.

And this, though express mention is not made in these presents of the real yearly value of all and singular the premises, or any of them, or of any gifts and grants heretofore made to the said archbishop, bishops, earl, *John, Thomas, Richard, Adam, John, James, and William*, or any of them, by us or any of our progenitors, or any statute, ordinance, or provision, heretofore to the contrary published, ordained, or provided, notwithstanding.

In witness, &c.—Witness the king, at his castle of *Windsor*, the twelfth day of *September*.

By the king himself, and of the date aforesaid, by the authority of parliament.

Stat.

Stat. 27 H. VIII. c. 20. A. D. 1535.

For Tithes to be paid throughout this Realm.

‘FORASMUCH as divers numbers of evil-disposed persons inhabited in sundry counties, cities, towns, and places of this realm, having no respect to their duties to Almighty God, but against right and good conscience having attempted to subtraēt and withhold in some places the whole, and in some places great parts of their tithes and oblations, as well personal as predial, due unto God and holy church; and, pursuing such their detestable enormities and injuries, have attempted in late time past to disobey, contemn, and despise the process, laws, and decrees of the ecclesiastical court of this realm, in more temerous and large manner than before this time hath been seen: for reformation of which injuries, and for unity and peace to be preserved amongst the king’s subjects of this realm, our sovereign lord the king, being supreme head on earth (under God) of the church of *England*, willing the spiritual rights and duties of that church to be preserved, continued, and maintained,’ hath ordained and enacted by authority of this present parliament, that every of his subjects of this realm of *England*, *Ireland*, *Wales*, and *Caleis*, and marches of the same, according to the ecclesiastical laws and ordinances of his church of *England*, and after the laudable uses and customs of the parish, or other place where he dwelleth or occupieth, shall yield and pay his tithes and offerings, and other duties of holy church; and that for such subtraction of any of the said tithes and offerings, or other duties, the parson, vicar, curate, or other party in that behalf grieved, may, by due process of the king’s ecclesiastical laws of the church of *England*, convent the person or persons offending before his ordinary, or other competent judge of this realm, having authority to hear and determine the right of tithes, as also to compel the same person or persons offending to do and yield their said duties in that behalf. And in case the ordinary of the diocese, or his commissary, or the archdeacon or his official, or any other competent judge aforesaid, for any contempt, contumacy, disobedience, or other misdemeanour of the party defendant, make information and request to any of the king’s most honourable council, or to the justices of the peace of the shire where such offender dwelleth, to assist and aid the same ordinary, commissary, archdeacon, official,

This statute is confirmed and enlarged by 2 & 3 Ed. 6. c. 13.

Tithes shall be paid according to the custom of the parish where they be due. The offender, in subtraction of tithes, shall be convicted before the ordinary.

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The of-
fender shall
be bound by
two justices
of peace,
&c. to obey
the ordina-
ry's sen-
tence.

or judge, to order or reform any such person in any cause before rehearsed; that then he of the king's said honourable council, or such two justices of peace, whereof the one to be of the *quorum*, to whom such information or request shall be made, shall have full power and authority, by virtue of this act, to attach or cause to be attached, the person or persons against whom such information or request shall be made, and to commit the same person or persons to ward, there to remain without bail and mainprize, till that he or they shall have found sufficient surety, to be bound by recognizance or otherwise before the king's said councillor, or justice of peace, or any other like councillor, or justice of peace, to the use of our said sovereign lord the king, to give due obedience to the process, proceedings, decrees, and sentences of the ecclesiastical court of this realm, wherein such suit or matter for the premises shall depend or be. And that every of the king's said councillors; or two justices of the peace, whereof the one to be of the *quorum*, as is aforesaid, shall have full power and authority, by virtue of this act, to take, receive, and record recognizances and obligations in any of the causes above written.

This act
shall not ex-
tend to the
citizens of
London.

II. Provided alway, that this act, or any thing therein contained, shall not extend to any inhabitant of the city of *London*, for or concerning any manner of tithe, offering, or other ecclesiastical duty, grown and due, to be paid or yielded within the same city, because there is another order made for the payment of tithes and other duties within the said city.

Every per-
son shall
have his de-
mand and
defence ac-
cording to
the laws ec-
clesiastical.

III. Provided also, that every person and persons, being party or parties to any such suit, shall and may make and have his and their lawful action, demand, or prosecution, appeals, prohibitions, and all other their lawful defences and remedies in every such suit, according to the said ecclesiastical laws, and laws and statutes of this realm, in as ample and liberal manner and form as they or any of them might have had, if this act had never been made; any thing in this act above written notwithstanding.

25 H. 8.
c. 19. f. 7.
13 Car. 2.
stat. 1. c.
12. f. 5.

IV. Provided always, and be it enacted by authority aforesaid, that this act for recovering of tithes, ne any thing therein contained, shall take force and effect but only until such time as the king's highness, and such other xxxii persons which his highness shall name and appoint for the making and establishing of such laws as his highness shall affirm and ratify, to be called the ecclesiastical laws of the church of *England*; and after the said laws so

ratified

ratified and confirmed as is afore said, that then the said tithes to be paid to every ecclesiastical person according to such laws, and none otherwise.

1535.

32 H. 8.
c. 7.

Stat. 27 H. VIII. c. 28. A. D. 1535.

All Monasteries given to the King, which have not Lands above
Two hundred Pounds by the Year*.

‘ FORASMUCH as manifest, synne, vicious, carnal, and abominable living is dayly used and committed commonly in such
‘ little and small abbeys, priories, and other religious houses of
‘ monks, canons, and nuns, where the congregation of such religious

* Bishop *Burnet*, after taking notice of the act for the suppression of the lesser monasteries, and stating the substance or bearing of the preamble, proceeds thus: “The lord *Herbert* thinks it strange, that the statute in the printed book has no preamble, but begins bluntly. *Fuller* tells us, that he wonders that lord did not see the record, and he sets down the preamble, and says, *the rest follow as in the printed statute, chap. 27th*, by a mistake for the 28th; this shews, that neither the one nor the other ever looked on the record; for there is a particular statute of dissolutions distinct from the 28th chapter; and the preamble which *Fuller* sets down, belongs not to the 28th chapter, as he says, but to the 18th chapter, which was never printed, and the 28th relates in the preamble to that other statute, which had given these monasteries to the king.” (*Hist. of the Reformation*, vol. i. p. 193.) It is to be regretted, that the right reverend historian did not tell us by what means he acquired this extraordinary information, which he has so confidently delivered; whether he depends upon hearsay only, or speaks from his own knowledge, having himself actually seen and examined the records to which he alludes. The passing of two acts for the same purpose, and to the same effect, in the same session, is neither usual nor parliamentary, and is the more strange at a time when it was the practice to pass all the bills of a session into a law on the same day, that is, not to give the royal assent to any bill till the last day of the session; a practice which originated in a notion that the giving of the royal assent determined the session. I have examined the rolls of parliament for this year in the parliament office, and I find no other act upon the rolls, but that which is commonly received as the 28th chapter, which is set out in the text, and has that very same preamble which *Mr. Fuller* has given. (*Ch. Hist.* p. 310.) That a preamble, which appears upon the roll to one act, should, in truth, belong to another; that there should be no trace or vestige of that other act in the repository where it ought to be found; no chasm in the numbers upon the roll; nothing to excite or to lead inquiry: all these things, added to the strange irregularity in the proceeding itself, which has been already noticed, throw such an air of improbability over this story, that it is impossible to credit it, supported, as it is, by no better authority than the simple assertion of so easy and credulous a writer as bishop *Burnet*. Though then *Mr. Fuller* did not see these two statutes which the bishop had the good fortune to discover, yet there can be little doubt but that *Mr. Fuller* had seen that statute which now appears upon the rolls, (and which should seem to be the only one that ever was there), and that he had seen the record itself, and that he extracted the preamble from it; for the number which the statute bears upon the roll is 57, (the numerical arrangement upon the roll not agreeing with that in the printed

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' gious persons is under the number of twelve persons, whereby
 ' the governors of such religious houses, and their covent, spoyle,
 ' dystroye, consume, and utterly waste, as well their churches,
 ' monasteries, priories, principal houses, farms, granges, lands,
 ' tenements, and hereditaments, as the ornaments of their churches,
 ' and their goods and chatells, to the high displeasure of Almighty
 ' God, slander of good religion, and to the great infamy of the
 ' king's highness and the realm, if redress should not be had
 ' thereof. And albeit that many continual visitations hath been
 ' heretofore had, by the space of two hundred years and more, for
 ' an honest and charitable reformation of such unthrifty, carnal,
 ' and abominable living, yet neverthelesse little or none amend-
 ' ment is hitherto had, but their vicious living shamelessly in-

books, because the publick and private acts are kept distinct and separate in the latter, whereas on the former they are reckoned together as they were passed), and the figure 5 might have been changed into 2, by an easy mistake of the printer or the copyist. Besides, in all the earlier compilations of the statutes, in the "published books" whence my lord *Herbert* acknowledges that he took his notion of the act, it has no preamble, but "begins bluntly." Indeed the act, as given by *Rastrell* and *Pulton*, not only wants the preamble, but is imperfect in other parts. *Pulton* gives no more than the first three sections, and *Russell* entirely omits the proviso in the 5th section, and the whole of the 6th section. Nor has either of these compilers marked the chapter, or made any mention at all of a chapter, so that it should seem as if they had transcribed the act into their books from the paper roll which they might possibly find in the office, that is, from the draught of the bill as it was originally brought into the house, before it went into a committee, and received all those clauses which it now bears. The act they have printed being the same, as far as it goes, with the act upon the roll, this should appear to be no very improbable conjecture; and we are unfortunately left merely to conjecture, as the journals for this year are lost, so that we cannot trace the progress of the bill through the houses, nor see what additions or alterations were made in it. It is remarkable, that the statute which was passed this session for erecting the court of augmentations, and which takes notice in its preamble of the *statute of dissolution*, is yet placed before this latter statute, both in the printed books and on the rolls, it being chapter 27 in the printed books, and No. 25 on the rolls. This inversion in the order, no doubt, happened from a blunder of the clerk, when the bills came to receive the royal assent; but it is very probable, that this statute for erecting the court of augmentations, may be that which the bishop alludes to as "relating in its preamble to that other statute, which had given these monasteries to the king." His lordship did not always stay to examine things thoroughly; he was generally in haste; he admits that he wrote this volume of his History in haste, though he somewhat oddly confirms it. (Introduction to vol. iii. of the Hist. of the Reform.) His son, the late Mr. Justice *Burnet*, used to say, it was written in so short a time as six weeks. Extreme accuracy in matters of fact is not to be expected in such a writer, any more than a very nice attention in his composition "to the circumstances of grammar and propriety."—I have spoken with the greater confidence as to the records in the parliament office, because I was assisted in my researches there by the clerk of the parliament, *Henry Cowper* esq. who left nothing unexamined, in order to satisfy my inquiries, and whose polite attentions I am proud thus publicly to acknowledge.

‘ creafeth

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' creaseth and augmenteth, and by a cursed custom so rooted and
 ' infected, that a great multitude of the religious persons in such
 ' small houses do rather chosse to rove abroad in apostasy, than
 ' to conform themselves to the observation of good religion; so
 ' that without such small houses be utterly suppressed, and the re-
 ' ligious persons therein committed to great and honourable mo-
 ' nasteries of religion in this realm, where they may be compelled
 ' to live religiously, for reformation of their lives, the same else be
 ' no redress nor reformation in that behalf. In consideration
 ' whereof, the king's most royal majesty, being supreme head on
 ' earth, under God, of the church of *England*, dayly studying
 ' and devyng the increase, advancement, and exaltacion of true
 ' doctrine and virtue in the said church, to the only glory and
 ' honour of God, and the total extirping and destruction of vice
 ' and sin, having knowledge that the premisses be true, as well by
 ' the accompts of his late visitations, as by sundry credible in-
 ' formations, considering also that diverse and great solemn
 ' monasteries of this realm, wherein (thanks to God) religion is
 ' right well kept and observed, be destitute of such full number of
 ' religious persons, as they ought and may keep, hath thought
 ' good, that a plain declaration should be made of the premisses,
 ' as well to the lords spiritual and temporal, as to other his loving
 ' subjects the commons in this present parliament assembled:
 ' whereupon the said lords and commons, by a great deliberation,
 ' finally be resolved, that it is and shall be much more to the plea-
 ' sure of Almighty God, and for the honour of this his realm,
 ' that the possessions of such small religious houses, now being
 ' spent, spoiled, and wasted for increase and maintenance of sin,
 ' should be used and committed to better uses, and the unthrifty
 ' religious persons, so spending the same, to be compelled to re-
 ' form their lives: And thereupon most humbly desire the king's
 ' highness that it may be enacted by authority of this present par-
 ' liament, that his majesty shall have and enjoy to him and his
 ' heirs for ever, all and singular such monasteries, priories, and other
 ' religious houses of monks, canons, and nuns, of what kinds of di-
 ' versities of habits, rules, or order soever they be called or named,
 ' which have not in lands, tenements, rents, tithes, portions, and
 ' other hereditaments, above the clear yearly value of two hundred
 ' pounds. And in like manner shall have and enjoy all the sites
 ' and circuits of every such religious houses, and all and singular the
 ' manors, granges, meases, lands, tenements, rents, reversions, ser-
 ' vices,

All monas-
 teries given
 to the king,
 which have
 not above
 two hun-
 dred pounds
 lands.

1535.

The king
shall have
all monas-
teries before
assigned to
him, or that
have been
suppressed.

vices, tithes, pensions, portions, churches, chapels, advowsons, patronages, annuities, rights, entries, conditions, and other hereditaments appertaining or belonging to every such monastery, priory, or other religious house, not having, as is aforesaid, above the said clear yearly value of two hundred pounds, in as large and ample manner as the abbots, priors, abbesses, prioresses, and other governors of such monasteries, priories, and other religious houses now have, or ought to have the same in the right of their houses.

And that also his highness shall have to him and to his heirs all and singular such monasteries, abbeys, and priories, which at any time within one year next before the making of this act hath been given and granted to his majesty by any abbot, prior, abbeys, or prioresses, under their covent seal, or that otherwise hath been suppressed or dissolved, and all and singular the manors, lands, tenements, rents, services, reversions, tithes, pensions, portions, churches, chapels, advowsons, patronages, rights, entries, conditions, and all other interests and hereditaments to the same monasteries, abbeys, and priories, or to any of them appertaining or belonging; to have and to hold all and singular the premises, with all their rights, profits, jurisdictions, and commodities, unto the king's majesty, and his heirs and assigns for ever, to do and use therewith his and their own wills, to the pleasure of Almighty God, and to the honour and profit of this realm.

They shall
enjoy those
abbey lands
to whom
the king
hath given
them.

II. And it is ordained and enacted by the authority aforesaid, that all and every person and persons, and bodies politick, which now have, or hereafter shall have, any letters patents of the king's highness, of any of the sites, circuits, manors, lands, tenements, rents, reversions, services, tithes, pensions, portions, churches, chapels, advowsons, patronages, tithes, entries, conditions, interests, or other hereditaments, which appertained to any monasteries, abbeys, or priories, heretofore given or granted to the king's highness, or otherwise suppressed or dissolved, or which appertaineth to any of the monasteries, abbeys, priories, or other religious houses, that shall be suppressed or dissolved by the authority of this act, shall have and enjoy the said sites, circuits, manors, lands, tenements, rents, reversions, services, tithes, pensions, portions, churches, chapels, advowsons, patronages, tithes, entries, conditions, interests, and all other hereditaments, contained and specified in their letters patents now being thereof made, and to be contained and expressed in any letters patents hereafter to be made, according

to the tenour, purport, and effect of any such letters patents; and shall also have all such actions, suits, entries, and remedies, to all intents and purposes, for any thing and things contained in every such letters patents now made, or to be contained in any such letters hereafter to be made, in like manner, form, and conditions, as the abbots, priors, abbeesses, prioresses, and other chief governors of any religious houses which had the same, might or ought to have had, if they had not been suppressed or dissolved,

1535.

III. Saving to every person and persons, and bodies politick, their heirs and successors, (other than the abbots, priors, abbeesses, prioresses, and other chief governors of the said religious houses specified in this act, and the covents of the same, and their successors, and such as pretend to be founders, patrons, or donors of such religious houses, of any lands, tenements, or hereditaments, belonging to the same, and their heirs and successors), all such right, title, interest, possessions, leases for years, rents, services, annuities, commodities, fees, offices, liberties, and livings, pensions, portions, corrodies, synodics, proxies, and all other profits as they or any of them hath, ought, or might have had in or to any of the said monasteries, abbeies, priories, or other religious houses, or in or to any manors, lands, tenements, rents, reversions, tithes, pensions, portions, or other hereditaments appertaining or belonging, or that appertained to any of the said monasteries, priories, or other religious houses, as if the same monasteries, priories, or other religious houses had not been suppressed by this act, but had continued in their essential bodies and states that they now be, or were in.

A saving of
the right of
others.

IV. Provided always, and be it enacted, that soasmuch as divers of the chief governors of such religious houses, determining the utter spoil and destruction of their houses, and dreading the suppressing thereof, for the maintenance of their detestable lives, have lately fraudulently and craftily made feoffments, estates, gifts, grants, and leases, under the covent seals, or suffered recoveries of their manors, lands, tenements, and hereditaments, in fee-simple, fee-tail, for term of life or lives, or for years, or charged the same with rents, or corrodies, to the great decay and diminution of the houses; that all such crafty and fraudulent recoveries, feoffments, estates, gifts, grants, and leases, and every of them, made by any of the said chief governors of such religious houses, under their covent seals, within one year next before the making of this act, shall be utterly void and of none effect: Provided always, that such person and persons as have leases for term of life, or years,

whereupon

Fraudulent
assurances
made by
governors
of houses
before their
dissolutions,
shall be
void.

1535.

whereupon is reserved the old rents and fermis accustomed, and such as have any offices, fees, or corrodies, that have been accustomed or used in such religious houses, and have bought any livery or living in any such houses, shall have and enjoy their said leases, offices, fees, corrodies, liberties, liveries, and livings, as if this act had never been made.

Ornaments,
jewels,
goods, chattels,
debts of monasteries,
given to the king.

V. And it is further enacted by authority aforesaid, that the king's highness shall have and enjoy to his own proper use, all such ornaments, jewels, goods, chattels, and debts, which appertained or belonged to any of the chief governors of the said monasteries, or religious houses, in the right of their said monasteries or houses, at the first day of *March* in the year of our Lord God 1535, or any time sithen whensoever, and to whose possession forever they shall come, or be found, except only such beasts, grain, and woods, and such other like chattel and revenues as have been sold before the said first day of *March*, or sithen, for the necessary or reasonable expences or charges of any of the said monasteries or houses.

Provided always, that such of the said chief governors which have been elect, or made abbots, priors, abbesses, or prioresses, of any of the said religious houses sithen the first day of *January* which was in the year of our Lord God 1534, and by reason thereof be bounden to pay the first-fruits to the king's highness, at days to come, limited by their bonds made for the same, that in every such case such chief governors, and their sureties, or any of them, shall be clearly discharged by authority of this act, against the king's highness, and all other persons, for the payment of such sums of money as they stand bounden to pay for the said first-fruits, or for any part thereof: And forasmuch as the clear yearly value of all the said monasteries, priories, and other religious houses in this realm, is certified into the king's exchequer, amongst the books of the yearly valuation of all the spiritual possessions of this realm, amongst which shall and may appear the certainty and number of such small and little religious houses, as have not in lands, tenements, rents, tythes, portions, and other hereditaments, above the said clear yearly value of two hundred pounds:

The king
shall have
the actual
possession of
the abbey
lands.

VI. Be it therefore enacted by authority aforesaid, that the king's highness shall have and enjoy according to this act, the actual and real possession of all and singular such monasteries, priories, and other religious houses, as shall appear by the said certificate remaining in the king's exchequer, not to have in lands, tenements, rents, tithes,

tithes, portions, and other hereditaments, above the said clear yearly value of two hundred pounds, so that his highness may lawfully give, grant, and dispose them, or any of them, at his will and pleasure, to the honour of God, and the wealth of this realm, without farther inquisitions or offices to be had or found for the same.

1535.

In consideration of which premises to be had to his highness, and to his heirs, as is aforesaid, his majesty is pleased and contented, of his most excellent charity, to provide to every chief head and governor of every such religious house, during their lives, such yearly pensions and benefices as for their degrees and qualities shall be reasonable and convenient, wherein his highness will have most tender respect to such of the said chief governors as well and truly preserve and keep the goods and ornaments of their houses, to the use of his grace, without spoil, waste, or embezzling the same; and also his majesty will ordain and provide, that the covents of every such religious house shall have their capacities, if they will, to live honestly and virtuously abroad, and some convenient charity disposed to them towards their living, or else shall be committed to such honourable great monasteries of this realm wherein good religion is observed, as shall be limited by his highness, there to live religiously during their lives; and it is ordained by the authority aforesaid, that the chief governors and covents of such honourable great monasteries shall take and accept into their houses, from time to time, such number of the persons of the said covents as shall be assigned and appointed by the king's highness, and keep them religiously, during their lives, within their said monasteries, in like manner and form as the covents of such great monasteries be ordered and kept.

Provided always, that all archbishops, bishops, and other persons which be or shall be chargeable to and for the collection of the tenths granted, and going out of the spiritual possessions of this realm, shall be discharged and acquitted of and for such parts and portions of the said tenths wherewith the said houses of religion, suppressed and dissolved by this act, were charged or chargeable to the king's highness, except of such sums of money thereof, as they, or any of them have, or shall have received for the said tenths, of the chief governors of such religious houses: Provided also, that where the clergy of the province of *Canterbury* stood, and be indebted to the king's highness in great sums

1535.

sums of money, remaining yet unpaid, of the rest of a hundred thousand pounds granted and given to his grace in their convocation, towards the payment whereof the said religious houses should have been contributory if they had not been suppressed by this act; and also some of the governors of the said religious houses have been collectors for levying of the said debt; and have received thereof great sums of money yet remaining in their hands; the king's most royal majesty is pleased and contented to deduct, abate, release, and defalk, to the said clergy, of the said rest yet unpaid, as well such sums of money as any the chief governors of such religious houses hath received, and not paid, as so much money as every of the said religious houses, suppressed by this act, were rated and taxed to pay in any one year, to and for the payment of the said hundred thousand pounds; and also the king's majesty is pleased and contented, that it be enacted by authority aforesaid, that his highness shall satisfy, content, and pay, all and singular such just and true debts which be owing to any person or persons by the chief governors of any the said religious houses, in as large and ample manner as the said chief governors should or ought to have done if this act had never been made: Provided always, that the king's highness, at any time after the making of this act, may at his pleasure ordain and declare, by his letters patents under his great seal, that such of the said religious houses which his highness shall not be disposed to have suppressed nor dissolved by authority of this act, shall still continue, remain, and be in the same body corporate, and in the said essential estate, quality, and condition, as well in possessions as otherwise, as they were afore the making of this act, without any suppression or dissolution thereof, or of any part of the same, by the authority of this act; and that every such ordinance and declaration, so to be made by the king's highness, shall be good and effectual to the chief governors of such religious houses which his majesty will not have suppressed, and to their successors, according to the tenors and purports of the letters patents thereof to be made, any thing or things contained in this act to the contrary hereof notwithstanding: Provided also, that where the clergy of the province of York stood, and be indebted to the king's highness in great sums of money yet unpaid, of the rest of such sums of money which was granted by them to his majesty in their convocation, towards the payment whereof the religious houses that shall be suppressed and dissolved by this act,

being

being within the same province, should have been contributory if they had not been dissolved, and also some of the governors of the said religious houses within the said province, that shall be suppressed by this act, have been collectors for levying of part of the said sums of money granted to the king's highness, as is afore said, and have certain sums thereof in their hands yet unpaid, the king's majesty is pleased and contented to deduct, abate, release, and defalk to the said clergy of the said province of York, of the rest of their said debt yet unpaid, as well such of the said sums of money, as any chief governors of any religious houses within the same province, that shall be suppressed by this act, hath been collected, and not paid, as so much money as every of the said religious houses, suppressed by this act, were rated and taxed to pay in any one year, towards the payment of the said sums of money granted to the king's highness.

VII. Provided always, that this act, or any thing or things therein contained, shall not extend, nor be prejudicial to any abbots or priors of any monasteries or priories being certified into the king's exchequer to have in possessions and profits spiritual and temporal, above the clear yearly value of two hundred pounds, for or concerning such cells of religious houses, appertaining or belonging to their monasteries or priories, in which cells the priors, or other chief governors thereof, be under the obedience of the abbots or priors to whom such cells belong, as the monks or canons of the convent of their monasteries or priories, and cannot sue, nor be sued, by the laws of this realm, in or by their own proper names, for the possession, or other things appertaining to such cells whereof they be priors or governors, but must sue and be sued in and by the names of the abbots or priors to whom they be obedient, and to whom such cells belong; and also be priors or governors dative, and removable from time to time, and accountants of the profits of such cells, at the only pleasure and will of the abbots or priors to whom such cells belong; but that every such cell shall be and remain undissolved in the same estate, quality, and condition, as if this act had never been made; any thing in this act to the contrary hereof notwithstanding.

VIII. Saving always, and reserving unto every person and persons, being founders, patrons, or donors of any abbeys, priories, or other religious houses, that shall be suppressed by this act, their heirs and successors, all such right, title, interest, possession, rents, annuities, fees, offices, leases, commons, and all other profits whatsoever,

1535.

A proviso
for the cells
of other
monasteries
being under
obedience.

The right
of founders
and patrons
saved.

1535.

soever, which any of them have, or should have had, without fraud or covin, by any manner of means, otherwise than by reason or occasion of the dissolution of the said abbies, priories, or other religious houses, in, to, or upon any the said abbies, priories, or other religious houses, whereof they be founders, patrons, or donors, or in, to, or upon any the lands, tenements, or other hereditaments, appertaining or belonging to the same, in like manner, form, and condition as other persons and bodies politick be saved by this act, as is afore rehearsed, and as if the said abbies, priories, or other religious houses, had not been suppressed and dissolved by this act, but had continued still in their essential bodies and estates as they be now in, any thing in this act to the contrary hereof notwithstanding.

Stat. 28 H. VIII. c. 11. A. D. 1536.

For the Restitution of the First-fruits in Time of Vacation to the next Incumbent.

The reasons
for making
this act.

‘ FORASMUCH as in the statute of the payment unto the king’s majesty, his heirs and successors, of the first-fruits of spiritual promotions, offices, benefices, and dignities, within this realm, and other the king’s dominions, express mention and declaration is not had ne made, from what time the year shall be accounted, in which the first-fruits shall be due and payable to his highness, that is to wit, whether immediately from the death, resignation, or deprivation of every incumbent, or from the time of admission or new taking of possession in every such promotion.

‘ II. And also by reason that in the same statute it is not declared who shall have the fruits, tithes, and other profits of the said benefices, offices, promotions, and dignities spiritual, during the time of vacation thereof, divers of the archbishops and bishops of this realm have, not only when the time of perceiving and taking of tithes, (that is to say, wool, lamb, corn, and hay, and tithes usually paid at the holy time of *Easter*) hath approached, deferred the collation of such benefices as have been of their own patronage, but also have, upon presentations of clerks made unto them by the just patrons, protracted and deferred to institute, induct, and admit the same clerks, to the intent that they might have and perceive to their own use the same tithes growing during the vacation; so that through such delays (over and above the first-fruits, which be justly due to the king’s highness) they have

' have been constrained also to lose all or the most part of one
' year's profits of their benefices and promotions, and to serve the
' cure at their and their friends proper costs and charges, or utterly
' to forsake and give over their benefices and promotions, to their
' great loss and hindrance.'

1536.

III. For reformation whereof, be it ordained and enacted by the king our sovereign lord, with the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, that the said year, in which the first-fruits shall be paid to the king's grace, shall begin and be accounted immediately after the avoidance or vacation of any such benefice or promotions spiritual afore rehearsed; and that the tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and all other whatsoever revenues, casualties, or profits, certain and uncertain, offering or belonging to any archdeaconry, deanry, prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, benefice, dignity, or office, (chaunteries only except), within this realm, or other the king's dominions, growing, rising, or coming, during the time of vacation of the same promotion spiritual, shall belong and affere to such person as shall be thereunto next presented, promoted, instituted, inducted, or admitted, and to his executors, towards the payment of the first-fruits to the king's highness, his heirs and successors; any usage, custom, liberty, privilege, or prescription, to the contrary had, used, or being, in anywise notwithstanding.

The time from which first-fruits are due to the king.

Fruits taken during the vacation of a benefice, shall be restored to the next incumbent.

IV. And it is also enacted by the authority aforesaid, that if any archbishop, bishop, archdeacon, ordinary, or any other person or persons to their uses and behoof, at any time heretofore sith the first day of *May* last past, have perceived, received, or taken, or at any time hereafter do perceive, receive, or take, the fruits, tithes, obventions, oblations, emoluments, commodities, revenues, rents, advantages, profits, or casualties, coming, growing, or belonging, or which hereafter shall come, grow, affere, or belong, to any archdeaconry, deanry, prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, benefice, dignity, or office, (chaunteries only excepted), within this realm, or other the king's dominions, during the vacation of such archdeaconry, deanry, prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, benefice, dignity, or office, (chaunteries only excepted), and the same, upon reasonable request from henceforth to be made, doth not render, restore,

The forfeiture of the ordinary who receiveth the fruits of a benefice during the vacation, and doth not restore them to the next incumbent.

1536.

satisfy, content, and pay to the next incumbent, being lawfully instituted, inducted, or admitted to such archdeaconry, deanry, prebend, parsonage, or vicarage, or other promotion, benefice, dignity, or office spiritual, except before excepted, or do let or interrupt the said incumbent to have the same; that then every archbishop, bishop, archdeacon, ordinary, or other person so doing, shall forfeit and lose the treble value of so much as he shall then have received of the fruits of every prebend, parsonage, vicarage, hospital, wardenhip, provostship, or other spiritual promotion, whereof he so shall perceive, receive or detain, let or interrupt the incumbent to perceive, receive, and have the fruits, tithes, obventions, oblations, emoluments, commodities, revenues, rents, advantages, profits, or casualties; the moiety of which forfeiture shall be to the king our sovereign lord, and the other moiety thereof to the incumbent of the same prebend, parsonage, or vicarage, or other spiritual promotion, to be recovered in any of the king's courts, by action, bill, plaint, information, or otherwise, in which action or suit the defendant shall not be admitted to wage his law, nor any protection or essoin shall be unto the defendant allowed.

What part
of the fruits
of a benefice
the ordinary
may retain in
his hands, and
for what
causes.

V. Provided always, that it shall be lawful to every archbishop, bishop, archdeacon, and ordinary, their officers and ministers, to retain in his or their custody so much of the tithes, fruits, obventions, oblations, emoluments, commodities, advantages, rents, revenues, casualties, and profits, as shall amount to pay unto such person or persons, as hath or shall serve or keep the cure of such archdeaconry, deanry, prebend, parsonage, or vicarage, or other spiritual promotion, during the vacation, his or their reasonable stipend or salary; and also for the collection, gathering, and levying of such tithes, fruits, emoluments, rents, and other profits rising and growing during the vacation aforesaid; any thing in this act contained to the contrary in anywise notwithstanding.

Incumbents
may declare
their wills
of any corn
sown by
them upon
their glebe
lands.

VI. Provided also, and be it further enacted by the authority aforesaid, that in case any of the incumbents aforesaid happen to die, and before his death have caused any of his glebe lands to be manured and sown at his proper costs and charges with any corn or grain; that then, in that case, all and every of the same incumbents may make and declare their testaments of all the profits of the corn growing upon the said glebe lands so manured and sown; any thing contained in this present act in anywise notwithstanding.

1539.

Stat. 31 H. VIII. c. 13. A. D. 1539.

An Act for Dissolution of Monasteries and Abbies.

WHERE divers and sundry abbots, priors, abbeſſes, priořeſſes,
 and other eccleſiaſtical governors and governeſſes of divers
 monaſteries, abbathies, priories, nunneries, colleges, hoſpitals,
 houſes of friers, and other religious and eccleſiaſtical houſes and
 places within this our ſovereign lord the king's realm of *England*
 and *Wales*, of their own free and voluntary minds, good wills,
 and aſſents, without constraint, coercion, or compulſion of any
 manner of perſon or perſons, ſithen the fourth day of *February*,
 the twenty-ſeventh year of the reign of our now moſt dread ſo-
 vereign lord, by the due order and courſe of the common laws of
 this his realm of *England*, and by their ſufficient writings of re-
 cord under their covent and common ſeals, have ſeverally given,
 granted, and by the ſame their writings ſeverally confirmed all
 their ſaid monaſteries, abbathies, priories, nunneries, colleges,
 hoſpitals, houſes of friers, and other religious and eccleſiaſtical
 houſes and places, and all their ſites, circuits, and precincts of
 the ſame, and all and ſingular their manors, lordſhips, granges,
 meaſes, lands, tenements, meadows, paſtures, rents, reverſions,
 ſervices, woods, tiſhes, penſions, portions, churches, chapels,
 advowſons, patronages, annuities, rights, entries, conditions,
 commons, leets, courts, liberties, privileges, and franchiſes, ap-
 pertaining, or in anywiſe belonging to any ſuch monaſtery, ab-
 bathy, priory, nunnery, college, hoſpital, houſe of friers, and
 other religious and eccleſiaſtical houſes and places, or to any of
 them, by whatſoever name or corporation they or any of them
 were then named or called, and of what order, habit, religion, or
 other kind or quality ſoever they or any of them were then re-
 puted, known, or taken; to have and to hold all the ſaid mo-
 naſteries, abbathies, priories, nunneries, colleges, hoſpitals,
 houſes of friers, and other religious and eccleſiaſtical houſes or
 places, ſites, circuits, precincts, manors, lands, tenements, mea-
 dows, paſtures, rents, reverſions, ſervices, and all other the pre-
 miſes, to our ſaid ſovereign lord, his heirs and ſucceſſors for
 ever, and the ſame their ſaid monaſteries, abbathies, priories,
 nunneries, colleges, hoſpitals, houſes of friers, and other religious
 and eccleſiaſtical houſes and places, ſites, circuits, precincts,
 manors, lordſhips, granges, meaſes, lands, tenements, meadows,

How leaſes
 made of ma-
 nors belong-
 ing to mo-
 naſteries
 diſſolved
 and aſſured
 to the king
 ſhall take
 effect.

1539.

Monasteries
and their
lands before
surrendered
or dissolved,
given to the
king.

‘ pastures, rents, reversions, services, and other the premises voluntarily, as is aforesaid, have renounced, left, and forsaken, and every of them hath renounced, left, and forsaken :’

II. Be it therefore enacted by the king our sovereign lord, and the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, that the king our sovereign lord shall have, hold, possess, and enjoy to him, his heirs and successors for ever, all and singular such late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, of what kinds, natures, qualities, or diversities of habits, rules, professions, or orders, they or any of them were named, known, or called, which sith the said fourth day of *February*, the twenty-seventh year of the reign of our said sovereign lord, have been dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other mean come to his highness, and by the same authority, and in like manner shall have, hold, possess, and enjoy all the sites, circuits, precincts, manors, lordships, granges, meases, lands, tenements, meadows, pastures, rents, reversions, services, woods, tithes, pensions, portions, parsonages appropriated, vicarages, churches, chapels, advowsons, nominations, patronages, annuities, rights, interests, entries, conditions, commons, fees, courts, liberties, privileges, franchises, and other whatsoever hereditaments, which appertained or belonged to the said late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, or to any of them, in as large and ample manner and form as the late abbots, priors, abbeesses, prioresses, and other ecclesiastical governors and governesses of such late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, had, held, or occupied, or of right ought to have had, holden, or occupied in the right of their said late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, or other religious and ecclesiastical houses and places, at the time of the said dissolution, suppression, renouncing, relinquishing, forfeiting, giving up, or by any other manner of mean coming of the same to the king's highness sithen the fourth day of *February* above specified.

All houses
to be dissolved, and

III. And it is further enacted by the authority aforesaid, that not only all the said late monasteries, abbathies, priories, nunneries, colleges,

1539.

colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, sites, circuits, precincts, manors, lordships, granges, meases, lands, tenements, meadows, pastures, rents, reversions, services, and all other the premises, forthwith, immediately, and presently, but also all other monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and all other religious and ecclesiastical houses and places, which hereafter shall happen to be dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other mean come to the king's highness; and also all the sites, circuits, precincts, manors, lordships, granges, meases, lands, tenements, meadows, pastures, rents, reversions, services, woods, tithes, pensions, portions, parsonages appropriate, vicarages, churches, chapels, advowsons, nominations, patronages, annuities, rights, interests, entries, conditions, commons, leets, courts, liberties, privileges, franchises, and other hereditaments whatsoever they be, belonging or appertaining to the same, or any of them, whensoever, and as soon as they shall be dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other mean come unto the king's highness, shall be vested, deemed, and adjudged by authority of this present parliament, in the very actual and real seisin and possession of the king our sovereign lord, his heirs and successors, for ever, in the state and condition as they now be, and as though all the said late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and all other religious and ecclesiastical houses and places so dissolved, suppressed, renounced, relinquished, forfeited, given up, or come unto the king's highness, as is aforesaid, as also the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, which hereafter shall happen to be dissolved, suppressed, renounced, relinquished, forfeited, given up, or come unto the king's highness, sites, circuits, precincts, manors, lordships, granges, lands, tenements, and other the premises, whatsoever they be, and every of them, were in this present act specially and particularly rehearsed, named, and expressed by express words, names, titles, and faculties, and in their natures, kinds, and qualities.

their Lands
given to
the king.

The sites
and lands of
the monas-
teries shall
be in the
actual pos-
session of
the king.

XIV. Provided also, and be it further enacted by the authority aforesaid, that all and every person and persons, their heirs and assigns, which sithen the said fourth day of *February*, by licence, pardon, confirmation, release, assent, or consent, of our said sovereign lord the king, under his great seal heretofore given, had, or made,

Assurance
to others by
the king's
licence of
any abbey
lands.

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or hereafter to be had or made, have obtained or purchased by denture, fine, feoffment, recovery, or otherwise, of the said abbots, priors, abbeſſes, prioſſes, or other governors or govern of any ſuch monaſteries, abbathies, priories, nunneries, colleges, hoſpitals, houſes of friers, or other religious and eccleſiaſtical houſes or places, any monaſteries, priories, colleges, hoſpitals, manors, lands, tenements, meadows, paſtures, woods, churches, chapels, parſonages, tiſhes, penſions, portions, or other hereditaments, ſhall have and enjoy the ſame, according to ſuch writs and aſſurances as been thereof before the firſt day of this parliament, or hereafter ſhall be, had or made :

A ſaving of the right of others accrued unto them before the ſaid purchaſe.

XV. Saving to all and every perſon and perſons, and bodies ſingle, their heirs and ſucceſſors, and the heirs and ſucceſſors of every of them, (other than the ſaid late abbots, abbeſſes, priors, prioſſes, and other governors and governeſſes, and their ſucceſſors and the ſucceſſors of every of them, and ſuch as pretend to be founders, patrons, or donors of the monaſteries, abbathies, priories, nunneries, colleges, hoſpitals, and other religious or eccleſiaſtical houſes or places, or of any of them, or of any manors, lands, tenements, or other hereditaments, late belonging to the ſame, or to any of them, and their heirs, ſucceſſors, and heirs and ſucceſſors of every ſuch founder, patron, or donor) ſuch right, title, intereſt, poſſeſſion, rents, annuities, commuties, offices, fees, liveries, and livings, portions, penſions, profits, ſynods, proxies, or other profits, which they or any of them have, ought, or might have had, in or to any of the ſaid monaſteries, abbathies, priories, colleges, hoſpitals, manors, lands, tenements, rents, ſervices, reverſions, tiſhes, penſions, portions, or other hereditaments, at any time before any ſuch purchaſe, inſtruments, fines, feoffments, recoveries, or other lawful mean betwixt any ſuch parties had or made, as is aboveſaid; this act, or thing therein contained, to the contrary notwithstanding.

XVI. And where our ſaid ſovereign lord, ſith the fourth day of February, the ſaid twenty ſeventh year of the reign of our ſaid ſovereign lord, hath obtained and purchaſed, as well by ſingle changes, as by gifts, bargains, fines, fundry feoffments, recoveries, deeds enrolled, and otherwiſe, of divers and fundry perſons many and divers honours, caſtles, manors, lands, tenements, meadows, paſtures, woods, rents, reverſions, ſervices, and other hereditaments, and hath not only paid divers and fundry ſums of money for the ſame, but alſo hath given and granted

‘ the same, unto divers and sundry persons, divers and sundry manors, lands, tenements, and hereditaments, and other recompences in and for full satisfaction of all such honours, castles, manors, lands, tenements, rents, reversions, services, and other his hereditaments, by his highness obtained or had, as is abovesaid:’ be it therefore enacted by the authority aforesaid, that our said sovereign lord the king, his heirs and successors, shall have, hold, possess, and enjoy, all such honours, castles, manors, lands, tenements, and other hereditaments, as his highness with the said fourth day of *February*, the twenty-seventh year abovesaid, hath obtained and had by way of exchange, bargain, purchase, or other whatsoever mean or means, according to the true meaning and intent of his highness bargain, exchange, or purchase, misrecital, misnaming, or nonrecital, or not naming of the said honours, castles, manors, lands, tenements, and other hereditaments, comprized or mentioned in the bargains or writings made between the king’s highness, and any other party or parties, or of the towns or counties where the said honours, castles, manors, lands, tenements, and hereditaments, lie and been, or any other matter or cause whatsoever it be, in anywise notwithstanding.

1539.

A confirmation of the king’s purchases made thence 4 Febr. Ann. 27 H. 8.

XVII. Saving to all and every person and persons, and to their heirs, bodies politick and corporate, and to their successors, and to every of them, other than such person and persons, and their heirs and their wives, and the wives of every of them, bodies politick and corporate, and their successors, and every of them, of whom the king’s highness hath obtained by exchange, gift, bargain, fine, feoffment, recovery, deed enrolled, or otherwise, any such honours, castles, manors, lands, tenements, and other hereditaments, as is aforesaid, all such right, title, use, interest, possession, rents, charges, annuities, commodities, fees, and other profits, (rents services and rents seck only except), which they, or any of them, have, might, or ought to have had, in or to the premises so obtained and had, or in or to any parcel thereof, if this act had never been had nor made; this present act, or any thing therein contained to the contrary notwithstanding.

A saving of the right of all others, but of the sellers, their heirs and wives.

An exception of rents, services, rents-seck.

‘ XVIII. And where it hath pleased the king’s highness of his most abundant grace and goodness, as well upon divers and sundry considerations his majesty specially moving, as also otherwise, to have bargained, sold, changed, or given, and granted by his grace’s several letters patents, indentures, or other writings, as well under his highness great seal, as under the seal of his

highness

1539.

highness dutchy of *Lancaster*, and the seal of the office of the augmentations of his crown, unto divers and sundry of his loving and obedient subjects, divers and sundry honours, castles, manors, monasteries, abbathies, priories, lands, tenements, rents, reversions, services, parsonages appropriate, advowsons, liberties, tithes, oblations, portions, pensions, franchises, privileges, liberties, and other hereditaments, commodities and profits, in fee-simple, fee-tail, for term of life, or for term of years; for avoiding of which letters patents, and of the contents of the same, divers, sundry, and many ambiguities, doubts, and questions might hereafter arise, be moved, and stirred, as well for misrecital or non-recital, as for divers other matters, things, or causes to be alleged, objected, or invented against the said letters patents, as also for lack of the finding of offices or inquisitions, whereby the title of his highness therein ought to have been found, before the making of the same letters patents, or for misrecital or nonrecital of leases, as well of record, as not of record, or for lack of the certainty of the values, or by reason of misnaming of the honours, castles, manors, monasteries, abbathies, priories, lands, tenements, and other hereditaments comprised and mentioned within the same letters patents, or of the towns and counties where the same honours, castles, manors, monasteries, abbathies, priories, lands, tenements, rents, and other hereditaments lien and been, as for divers and sundry other suggestions and surmises, which hereafter might happen to be moved, surmised, and procured against the same letters patents, albeit the words in effect contained in the said letters patents be according to the true intent and meaning of his most royal majesty :

The king's patents sufficient notwithstanding misrecital, not finding of offices, &c. 34 & 35 H. 8. c. 21.

XIX. Be it therefore enacted by the authority of this present parliament, that as well all and every the said letters patents, indentures, and other writings, and every of them, under the seal or seals abovesaid, or of any of them, made or granted by the king's highness sithen the said fourth day of *February*, the said twenty-seventh year of his most noble reign, as all and singular other his grace's letters patents, indentures, or other writings to be had, made, or granted to any person or persons within three years next after the making of this present act, of any honours, castles, manors, monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, or of other religious or ecclesiastical houses or places, sites, circuits, precincts, lands, tenements, parsonages, tithes, pensions, portions, advowsons, nominations, and all other hereditaments,

hereditaments and possessions, of what kind, nature, or quality soever they be, or by whatsoever name or names they or any of them be named, known, or reputed, shall stand and be good, effectual, and available in the law of this realm, to all respects, purposes, constructions, and intents, against his majesty, his heirs, and successors, without any other licence, dispensation, or tolerance of the king's highness, his heirs, and successors, or of any other person or persons whatsoever they be, for any thing or things contained, or hereafter to be contained, in any such letters patents, indentures, or other writings; any cause, consideration, or thing material, to the contrary in anywise notwithstanding:

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XX. Saving to all and singular persons, bodies politick and corporate, their heirs and successors, and the heirs and successors of every of them, (other than his highness, his heirs and successors, and the said governors and governesses, and their successors, donors, founders, and patrons, aforementioned, and their heirs and successors, and all other persons claiming in their rights, or to their use, or in the right or to the use of any of them), all such right, title, claim, interest, possession, reversion, remainder, offices, annuities, rent-charges, and commons, which they or any of them have, ought, or might have had, in or to any of the said honours, castles, manors, monasteries, abbathies, priories, lands, tenements, and other hereditaments in the said letters patents made, or hereafter to be made, comprised at any time before the making of the said such letters patents; this act, or any thing therein contained, to the contrary notwithstanding.

A saving of the right of others in the lands assured by the king.

XXI. And where divers and sundry abbots, priors, abbeffes, prioresses, and other ecclesiastical governors and governesses of the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, have had, possessed, and enjoyed, divers and sundry parsonages appropriated, tithes, pensions, and portions, and also were acquitted and discharged of and from the payment or payments of tithes, to be paid out of or for their said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, manors, messuages, lands, tenements, and hereditaments: be it therefore enacted by the authority aforesaid, that as well the king our sovereign lord, his heirs and successors, as all and every such person and persons, their heirs and assigns, which have, or hereafter shall have any monasteries, abbathies, priories, nunneries, colleges,

Such abbey lands as before the dissolution of them were discharged of tithes, shall so continue.

1539.

leges, hospitals, houses of friers, or other ecclesiastical houses or places, sites, circuits, precincts of the same, or any of them, or any manors, messuages, parsonages appropriate, tithes, pensions, portions, or other hereditaments, whatsoever they be, which belonged or appertained, or which now belong or appertain unto the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, or other religious and ecclesiastical houses or places, or unto any of them, shall have, hold, retain, keep, and enjoy, as well the said parsonages appropriate, tithes, pensions, and portions, of the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, sites, circuits, precincts, manors, meases, lands, tenements, and other hereditaments whatsoever they be, and every of them, according to their estates and titles, discharged and acquitted of payment of tithes, as freely, and in as large and ample manner as the said late abbots, priors, abbesses, prioresses, and other ecclesiastical governors and governesses, or any of them, had, held, occupied, possessed, used, retained, or enjoyed the same, or any parcel thereof, at the days of their dissolution, suppression, renouncing, relinquishing, forfeiting, giving up, or coming to the king's highness, of such monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, or other religious or ecclesiastical houses or places, or at the day of the dissolution, suppression, renouncing, relinquishing, giving up, or coming to the king's highness of any of them; this act, or any thing therein contained, to the contrary notwithstanding:

All rents, services, &c. reserved to the king.

XXII. Saving to the king's highness, his heirs and successors, all and all manner of rents, services, and other duties whatsoever they be, as if this act had never been had nor made.

Monasteries, &c. exempt from visitations and jurisdiction of the ordinary.

XXIII. And be it further enacted by authority of this present parliament, that such of the said late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, and all churches and chapels to them, or any of them belonging, which, before the dissolution, suppression, renouncing, relinquishing, forfeiting, giving up, or coming unto the king's highness, were exempted from the visitation or visitations, and all other jurisdiction of the ordinary or ordinaries, within whose diocese they were situate or set, shall from henceforth be within the jurisdiction and visitation of the ordinary or ordinaries within whose diocese they or any of them be situate and set, or within the jurisdiction and visitation of such person or

persons

persons as by the king's highness shall be limited or appointed; this act, or any other exemption, liberty, or jurisdiction to the contrary notwithstanding.

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Stat. 32 H. VIII. c. 7. A. D. 1540.

For the true Payment of Tithes and Offerings.

WHERE divers and many persons inhabiting in sundry countries and places of this realm, and other the king's dominions, not regarding their duties to Almighty God, and to the king our sovereign lord, but in few years past more contemptuously and commonly presuming to offend and infringe the good and wholesome laws of this realm, and gracious commandments of our said sovereign lord, than in times past hath been seen or known, have not letted to subtract and withdraw the lawful and accustomed tithes of corn, hay, pasturages, and other sort of tithes and oblations commonly due to the owners, proprietaries, and possessors of the parsonages, vicarages, and other ecclesiastical places of and within the said realm and dominions, being the more encouraged thereto, for that divers of the king's subjects, being lay persons, having parsonages, vicarages, and tithes to them, and to their heirs, or to them, and to their heirs of their bodies lawfully begotten, or for term of life, or years, cannot by the order and course of the ecclesiastical laws of this realm, sue in any ecclesiastical court for the wrongful withholding and detaining of the said tithes, or other duties, nor cannot by the order of the common laws of this realm have any due remedy against any person or persons, their heirs or assigns, that wrongfully detaineth or withholdeth the same; by occasion whereof much controversy, suit, variance, and discord is like to ensue among the king's subjects, to the great detriment, damage, and decay of many of them, if convenient and speedy remedy therefore be not had and provided:

This act is confirmed and enlarged by 2 & 3 Ed. 6. c. 13.

II. Wherefore it is ordained and enacted by our said sovereign lord the king, with the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, That all and singular persons of this his said realm, or other his dominions, of what estate, degree, or condition soever he or they be, shall fully, truly, and effectually divide, set out, yield, or pay, all and singular tithes and offerings aforesaid, according

Tithes shall be paid according to the custom of the parish where they be due.

1540.

The offend-
er convent-
ed before
the ordi-
nary.

according to the lawful customs and usages of parishes and places where such tithes or duties shall grow, arise, come, or be due; and in case that shall happen, any person or persons, of his or their ungodly or perverse will and mind, to detain and withhold any of the said tithes or offerings, or any part or parcel thereof, then the person or persons, being ecclesiastical or lay person, having cause to demand or have the said tithes or offerings, being thereby wronged or grieved, shall and may convent the person or persons so offending before the ordinary, his commissary, or other competent minister, or lawful judge of the place where such wrong shall be done, according to the ecclesiastical laws; and in every such cause or matter of suit, the same ordinary, commissary, or other competent minister, or lawful judge, having the parties, or their lawful procurators, before him or them, shall and may, by virtue of this act, proceed to the examination, hearing, and determination of every such cause or matter ordinarily or summarily, according to the course and process of the said ecclesiastical laws, and thereupon may give sentence accordingly.

The appel-
lant shall
pay costs
of suit to
the other
party.

III. And in case that any of the parties, for any cause or matter concerning that suit, do appeal from the sentence, order, and definitive judgment of the said ordinary, or other competent judge, as is aforesaid, then the same judge, by virtue of this act, forthwith upon such appellation made, shall adjudge to the other party the reasonable costs of his suit therein before expended, and shall compel the same party appellant to satisfy and pay the same costs so adjudged by compulsory process, and censures of the said laws ecclesiastical, taking surety of the other party to whom such costs shall be adjudged and paid, to restore the same costs to the party appellant, if after the principal cause of that suit of appeal shall be adjudged against the same party to whom the same costs shall be yielded; and so every ordinary, or other competent judge ecclesiastical, by virtue of this act shall adjudge costs to the other party upon every appeal to be made in any suit or cause of subtraction, or detention of any tithes, or offerings, or in any other suit to be made for or concerning the duty of such tithes or offerings.

The offend-
er shall
be bound
by two jus-
tices of
peace to
obey the
ordinary's
sentence.

IV. And further be it enacted by the authority aforesaid, that if any person or persons, after such sentence definitive given against them, obstinately and wilfully refuse for to pay their tithes, or duties, or such sums of money so adjudged, wherein they be condemned for the same, that then two justices of the peace for the same shire, whereof one to be of the quorum, shall have authority
by

by this act, upon information, certificate, or complaint to them made in writing by the said ecclesiastical judge that gave the same sentence, to cause the same party so refusing to be attached, and committed to the next gaol, and there to remain, without bail or mainprize, till he or they shall have found sufficient sureties to be bound by recognizance, or otherwise, before the same justices, to the use of our sovereign lord the king, to perform the said definitive sentence and judgment.

1540.

V. Provided always, and be it enacted by the authority aforesaid, that no person or persons shall be sued, or otherwise compelled to yield, give, or pay any manner of tithes, for any manors, lands, tenements, or other hereditaments, which by the laws or statutes of this realm are discharged, or not chargeable with the payment of any such tithes.

Lands discharged of tithes.

VI. Provided also, and be it enacted by authority aforesaid, that this act, nor any thing therein contained, shall in anywise bind the inhabitants of the city of *London*, and suburbs of the same, for to pay their tithes and offerings within the same city and suburbs otherwise than they ought or should have done before the making of this act; any thing in this act contained to the contrary notwithstanding.

The inhabitants of London.

VII. And be it further enacted by the authority aforesaid, that in all cases, where any person or persons which now have, or which hereafter shall have any estate of inheritance, freehold, term, right, or interest, of, in, or to any parsonage, vicarage, portion, pension, tithes, oblations, or other ecclesiastical or spiritual profit, which now be, or which hereafter shall be made temporal, or admitted to be, abide, and go to or in temporal hands, and lay uses and profits by the law or statutes of this realm, shall hereafter fortune to be disseised, deforced, wronged, or otherwise kept or put from their lawful inheritance, estate, seisin, possession, occupation, term, right, or interest of, in, or to the same, or of, in, or to any parcel thereof, by any other person or persons claiming or pretending to have interest or title in or to the same; that then in all and every such case or cases, the person or persons so disseised, deforced, or wrongfully kept or put from his or their right or possession, as is afore rehearsed, their heirs, wives, and such other to whom such injury and wrong shall be done or committed, shall and may have their remedy in the king's temporal courts, or other temporal courts, as the case shall require, for the recovery, getting, or obtaining of such inheritance, estate, freehold, seisin, possession, term;

Recoveries may be had, and conveyances made in temporal courts, of tithes, as of lands.

1540. term, right, or interest, by writs original of *præc' quod reddat*, affize of *novel disseisin*, *mortdanc' quod ei deforciat*, writs of dower, or other writs original, as the case shall require, to be devised and granted in the king's court of chancery, of every such parsonage, vicarage, portion, pension, or other profit called ecclesiastical or spiritual, so to be demanded according to the nature and cause of the suit thereof, in like manner and form as they should, ought, or might have had, of or for lands, tenements, or other hereditaments in such manner to be demanded; and that writs of covenant and other writs for fines to be levied, and all other assurances to be had, made, or conveyed, of any such parsonage, vicarage, portion, pension, or other profit called ecclesiastical or spiritual, as is aforesaid, shall be hereafter devised and granted in the said chancery according as hath been used for fines to be levied, and assurance to be had or made, or conveyed, of lands, tenements, or other hereditaments; and that all judgments to be given upon any of the said writs original, so to be devised or granted of or for any the premisses, or any of them, and all fines to be levied and knownledged in any of the king's said courts thereof, shall be of like force and effect in the law, to all intents and purposes, as judgments given, and fines levied of lands, tenements, and hereditaments in the same courts upon writs original therefore duly pursued and prosecuted, albeit no such form of writs original out of the said court of chancery have heretofore proceeded or been awarded.

Judgments given, and fines levied in the king's courts, of tithes, shall be of like force as of lands.

Remedy shall be had for tithes and offerings in the spiritual courts, and not in the temporal.

VIII. Provided always, that this last act shall not extend nor be expounded to give any remedy, cause of action or suit in the courts temporal against any person or persons which shall refuse or deny to set out his or their tithes, or which shall detain, withhold, or refuse to pay his tithes or offerings, or any parcel thereof; but that in all such cases the person or party, being ecclesiastical or lay person, having cause to demand or have the said tithes or offerings, and thereby wronged or grieved, shall take and have their remedy for their said tithes or offerings in every such case in the spiritual courts, according to the ordinance in the first part of this act mentioned, and not otherwise; any thing herein expressed to the contrary thereof notwithstanding.

27 H. 8. c.
40.

1540.

Stat. 32 H. VIII. c. 24. A. D. 1540.

An Act concerning the Possessions of St. *John* of *Jerusalem*, in
England and *Ireland*.

THE lords spiritual and temporal, and the commons, in this present parliament assembled, having credible knowledge, that divers and sundry the king's subjects, called the Knights of *Rhodes*, otherwise called Knights of St. *Johns*, otherwise called Friars of the Religion of St. *John* of *Jerusalem* in *England*, and of a like house being in *Ireland*, abiding in the parts beyond the sea, and having as well out of this realm, as out of *Ireland*, and other the king's dominions, yearly great sums of money for maintenance of their livings, have unnaturally, and contrary to the duty of their allegiances, sustained and maintained the usurped power and authority of the bishop of *Rome*, lately used and practised within this realm, and other the king's dominions; and have not only adhered themselves to the said bishop, being common enemy to the king our sovereign lord, and to this his realm, untruly upholding, knowing, and affirming maliciously and traitorously the same bishop to be supreme and chief head of Christ's church by God's holy word, intending thereby to subvert and overthrow the good and godly laws and statutes of this realm, their natural country, made and grounded by authority of holy church, by the most excellent wisdom, policy, and goodness of the king's majesty, with the whole assent and consent of the realm, for the abolishing, expelling, and utter extirpating of the said usurped power and authority, but also have defamed and slandered as well the king's majesty, as the noblemen, prelates, and other the king's true and loving subjects of this realm, for their good and godly proceeding in that behalf; have therefore deeply pondered and considered, that like as it is and was a most godly act of the king's most royal majesty, and the said noblemen, prelates, and commons, of this realm, utterly to expulse and abolish, not only from this realm, but also from other the king's dominions, the said usurped power and authority of the bishop of *Rome*, and also the hypocritical and superstitious religion in this realm, and other the king's dominions, being his members and adherents, having their original erection and foundation by the said usurped authority;

The lands and goods of St. *John* of *Jerusalem* shall be in the king's disposition.

The causes why the houses of St. *Johns* of *Jerusalem* were dissolved, and their lands given to the king.

1540.

' rity; by expulſing whereof, God's holy word, neceſſary for
 ' increaſe of virtue, and ſalvation of chriſten ſouls, is not only
 ' purely and ſincerely advanced, and ſet forth, but alſo the extort
 ' exactions of innumerable ſums of money craftily exhausted out
 ' of this realm, and of other the king's dominions, by the colour
 ' of the ſaid uſurped authority, is removed, and taken away, to the
 ' ineſtimable benefit and commodity of the king's loving ſubjects;
 ' ſo like manner of wiſe, it ſhould be moſt dangerous to be ſuffered or
 ' permitted within this realm, or in any other the king's dominions,
 ' any religion, being ſparks, leaves, and imps of the ſaid root of
 ' iniquity; conſidering alſo, that the iſle of *Rhodes*, whereby the
 ' ſaid religion took their old name and foundation, is ſurpriſed by
 ' the *Turk*; and that it were and is much better, that the poſſeſ-
 ' ſions in this realm, and in other the king's dominions, appertain-
 ' ing to the ſaid religion, ſhould rather be employed and ſpent
 ' within this realm, and in other the king's dominions, for the de-
 ' fence and ſurety of the ſame, than converted to and among ſuch
 ' unnatural ſubjects, who have declined not only from their natural
 ' duty of obedience that they ought to bear unto the king our ſo-
 ' vereign lord, but alſo from the good laws and ſtatutes of this
 ' realm, their natural country, daily doing, and attempting privily
 ' and craftily all that they can to ſubvert the good and godly po-
 ' licy, in the which, thanks be to God and our moſt dread ſove-
 ' reign lord, this realm and other the king's dominions now ſtand;
 ' in conſideration whereof, the ſaid lords ſpiritual and temporal,
 ' and the commons, in this preſent parliament aſſembled, moſt hum-
 ' bly beſeechen the king's moſt royal majeſty, that it may be
 ' enacted by his highneſs, and by the aſſent of the lords ſpiritual
 ' and temporal, and the commons, in this preſent parliament aſſem-
 ' bled, that the corporation of the ſaid religion, as well within this
 ' realm, as within the king's dominion and land of *Ireland*, by what-
 ' ſoever name or names they be founded, incorporated, or known,
 ' ſhall be utterly diſſolved, and void to all intents and purpoſes; and
 ' that Sir *William Weſton* knight, now being prior of the ſaid religion
 ' of this realm of *England*, ſhall not be named or called from hence-
 ' forth, prior of *St. Johns of Jeruſalem in England*, but ſhall be
 ' called by his proper name of *William Weſton* knight, without fur-
 ' ther addition touching the ſaid religion; and that likewise *John*
 ' *Rauſon* knight, now being prior of *Kilmainam in Ireland*, ſhall
 ' not be called or named from henceforth, prior of *Kilmainam in*
 ' *Ireland*,

The corpo-
 ration of re-
 ligion of St.
 Johns in
 England
 and Ireland
 ſhall be diſ-
 ſolved.

The priors
 and con-
 freres of St.
 John ſhall
 be called by
 their own
 names and
 ſurnames,
 without any
 addition of
 their reli-
 gion.

Ireland, but only by his proper name of *John Raufon* knight, without further addition touching the said religion; nor that any of the brethren or confreres of the said religion in this realm of *England*, and land of *Ireland*, shall be called Knights of *Rhodes*, nor Knights of *St. Johns*, but shall be called by their own proper christen names and surnames of their parents, without any other addition touching the said religion.

II. And be it further enacted by authority of this present parliament, that if the said *William Weston*, or any of his brethren or confreres of the hospital or house of *St. John of Jerusalem* in *England*, now abiding and dwelling within this realm of *England*, or any other person or persons, being members professed of or in the said hospital, now dwelling within the said realm, at any time after the first day of *July* next coming, do use or wear within this realm or elsewhere, in or upon any apparel of their bodies, any sign, mark, or token heretofore used and accustomed, or hereafter to be devised for the knowledge of the said religion, or make any congregations, chapters, or assemblies touching the same religion; or maintain, support, use, or defend any liberties, franchises, or privileges heretofore granted to the said religion, by the authority of the bishop of *Rome*, or of the see of the same; that then every of them so offending shall incur and run into the pains, forfeitures, and penalties ordained and provided by the statute of provision and *præmunire*, made in the sixteenth year of king *Richard* the second; and if the said *John Raufon* knight, or any of his brethren, or confreres of the said hospital or house of *Kilmainam* in *Ireland*, or any other person or persons, being members professed of or in the said hospital of *Kilmainam*, now abiding, and now dwelling within the land of *Ireland*, at any time after the last day of *September* next coming, do use or wear within this realm, or within the said land of *Ireland*, or elsewhere, in or upon any apparel of their bodies, any sign, mark, or token heretofore used and accustomed, or hereafter to be devised for the knowledge of the same religion, or make any congregations, chapters, or assemblies touching the same religion, or maintain, support, use, or defend any manner of liberties, franchises, or privileges heretofore granted to the same, by authority of the bishop of *Rome*, or of the see of the same; that then every of them so offending shall incur and run into the pains, forfeitures, and penalties ordained and provided by the said statute of provision and *præmunire*, made in the said sixteenth year of king *Richard* the second.

1540.

The penalty on the said priors or confreres wearing any sign of their religion, or making any assemblies touching the same, or defending any privileges thereto.

16 R. 2. c. 5.

1540.

III. And be it likewise enacted by the authority aforesaid, that if any the knights, or confreres of the said religion, being the king's natural subjects, which now inhabit, abide, and dwell out of any the king's dominions, at any time after the first day of *February* next coming, do offend in any of the articles or offences next above rehearsed, that then every of them so offending shall incur and run into the said pains, forfeitures, and penalties next above remembered.

The king
shall have
the manors,
lands, &c.
lately be-
longing to
the prior
and brethren
of St. John
in England
and Ireland.

IV. And be it further enacted by the authority aforesaid, that the king's majesty, his heirs and successors, shall have and enjoy all that hospital, mansion-house, church, and all other houses, edifices, buildings, and gardens to the same belonging, being near to the city of *London*, in the county of *Middlesex*, called The House of St. *Johns* of *Jerusalem* in *England*; and also all that hospital, church, and house of *Kilmainam* in the land of *Ireland*, and all and singular castles, honours, manors, meases, lands, tenements, rents, reversions, services, woods, meadows, pastures, parks, warrens, liberties, franchises, privileges, parsonages, tithes, pensions, portions, knights fees, advowsons, commandries, preceptories, contributions, responsons, rents, titles, entries, conditions, covenants, and all other possessions and hereditaments, of what natures, names, or qualities soever they be, and wheresoever they be or lie within this realm of *England*, or within the land of *Ireland*, or elsewhere within the king's dominions, which appertained or belonged to the said religion, or to the priors, masters, or governors, knights, or other ministers professed of or in the same, by the pretence, or in the right of the said religion, and all and singular goods, chattels, debts, arrearages of rents and farms, and all other things real and personal, whatsoever they be, whereof or whereunto any of the said priors, brethren, or confreres, or persons professed in the said religion, can have, or claim any particular propriety to their own proper use, by the rules and statutes of the said religion; to have and to hold the premisses, and every of them, to our said sovereign lord, and to his heirs and successors for ever, to use and employ, by his most excellent wisdom and discretion, at his own free-will and pleasure; and that his highness shall be deemed and adjudged in the real and actual possession of the premisses, by virtue and authority of this present act: saving to all persons, and bodies politick, their heirs and successors, and the heirs and successors of every of them, (other than the said prior of St. *Johns* of *Jerusalem* in *England*, and the said prior of *Kilmainam*

in the land of *Ireland*, and the brethren or confreres of every of them, and the successors of every of them, and all and every other person and persons of the said religion, and their successors, and every of them, and the successors of every of them), all such right, title, interest, possession, leases, grants, annuities, fees, offices, corrodies, reversions, rents, and services, rent-charges, commons, rights, titles, entries, actions, petitions, pensions, portions, and all other hereditaments, of what names, natures, or qualities soever they be, which they have, should, or ought to have had, if this act had never been had ne made; any thing in this act to the contrary thereof notwithstanding.

1540.

A saving of
the right of
others.

Stat. 37 H. VIII. c. 12. A. D. 1545.

An Act for Tithes in *London*.

WHERE of late time contention, strife, and variance hath risen and grown within the city of *London*, and the liberties of the same, between the parsons, vicars, and curates of the said city, and the citizens and inhabitants of the same, for and concerning the payment of tithes, oblations, and other duties within the said city and liberties: for appeasing whereof, a certain order and decree was made thereof by the most reverend father in God, *Thomas* archbishop of *Canterbury*, metropolitane, chief primate of all *England*, *Thomas Audley* knight, lord *Audley* of *Walden*, and then lord chancellor of *England*, now deceased, and other of the king's majesty's most honourable privy council, and also the king's letters patents and proclamation was made thereof, and directed to the said citizens concerning the same; whereupon it was after enacted in the parliament holden at *Westminster* by prorogation the fourth day of *February* in the twenty-seventh year of the king's majesty's most noble reign, by authority of the same parliament, that the citizens and the inhabitants of the same city should, at *Easter* then next coming, pay unto the curates of the said city and suburbs, all such and like sums of money for tithes, oblations, and other duties, as the said citizens and inhabitants by the order of the said late lord chancellor, and other the king's most honourable council, and the king's said proclamation, paid or ought to have paid by force and virtue of the said order at *Easter*, which was in the year of our Lord God, *mdxxxv*, and the same payments so to continue from time to time, until such time as any other order or law should be made,

A rehearsal
of the sta-
tute of 27
H. 8. c. 21.
concerning
the payment
of tithes in
London.

1545.

Arbitrators
chosen be-
tween the
parsons, vi-
cars, and
curates of
London,
and the citi-
zens and
inhabitants
of the same,
touching
the pay-
ment of
tithes.

‘ published, ratified, and confirmed by the king’s highness, and the
 ‘ two and thirty persons by his grace to be named, as well for the
 ‘ full establishment concerning the payment of all tithes, oblations,
 ‘ and other duties of the inhabitants within the said city, suburbs,
 ‘ and liberties of the same, as for the making of other ecclesiastical
 ‘ laws of this realm of *England*, and that every person denying
 ‘ to pay, as is aforesaid, should, by the commandment of the mayor
 ‘ of *London* for the time being, be committed to prison, there to
 ‘ remain until such time as he or they should have agreed with the
 ‘ curate or curates for their said tithes, oblations, and other du-
 ‘ ties, as is aforesaid, as in the said act more plainly appeareth:
 ‘ sithen which act divers variances, contentions, and strifes are
 ‘ newly risen and grown between the said parsons, vicars, and cu-
 ‘ rates, and the said citizens and inhabitants, touching the payment
 ‘ of the tithes, oblations, and other duties, by reason of certain
 ‘ words and terms specified in the said order, which are not so
 ‘ plainly and fully set forth, as is thought convenient and meet to
 ‘ be; for appeasing whereof, as well the said parsons, vicars, and
 ‘ curates, as the said citizens and inhabitants have compromised
 ‘ and put themselves to stand to such order and decree touching
 ‘ the premisses, as shall be made by the said right reverend father
 ‘ in God, *Thomas* archbishop of *Canterbury*, metropolitane and pri-
 ‘ mate of *England*; the right honourable sir *Thomas Wryothesly*
 ‘ knight, lord *Wryothesly* and lord chancellor of *England*; the right
 ‘ honourable *Thomas* duke of *Norfolk*, lord treasurer of *England*; the
 ‘ right honourable sir *William Paulet* knight; lord *St. John*, lord
 ‘ president of the council, and lord great master of the king’s most
 ‘ honourable household; the right honourable sir *John Russel* knight,
 ‘ lord *Russel* and lord privy seal; the right honourable *Edward* earl
 ‘ of *Hertford*, lord great chamberlain of *England*; the right honour-
 ‘ able *John* viscount *Lisle*, high admiral of *England*; sir *Richara*
 ‘ *Lister* knight, chief justice of *England*; sir *Edward Mountagu*
 ‘ knight, chief justice of the common bench at *Westminster*; and sir
 ‘ *Roger Cholmely* knight, chief baron of the exchequer; for a fina-
 ‘ end and conclusion to be had and made touching the premisses for
 ‘ ever. And to the intent to have a full peace and perfect end
 ‘ between the said parties, their heirs and successors, touching the
 ‘ said tithes, oblations, and other duties for ever,’ be it enacted by
 ‘ authority of this present parliament, that such end, order, and
 ‘ direction, as shall be made, decreed, and concluded by the forenamed
 ‘ archbishop, lords, and knights, or any six of them, before the first
 ‘ day

day of *March* next ensuing, of, for, and concerning the payments of the tithes, oblations, and other duties within the said city, and the liberties of the same, and inrolled in the king's high court of chancery of record, shall stand, remain, and be as an act of parliament, and shall bind as well all citizens and inhabitants of the said city and liberties for the time being, as the said parsons, vicars, curates, and their successors for ever, according to the effect, purport, and intent of the said order and decree so to be made and inrolled; and that every person denying to pay any of his or their tithes, oblations, or other duties, contrary to the said decree so to be made, shall, by the commandment of the mayor of *London* for the time being, and in his default or negligence, by the lord chancellor of *England* for the time being, be committed to prison, there to remain till such time as he or they have agreed with the curate and curates for his or their said tithes, oblations, and other duties, as is aforesaid.

1545.

The penalty upon such as refuse to pay their tithes according to the arbitrators decree.

THE DECREE.

II. **A**s touching the payment of tithes in the city of *London*, and the liberties of the same, it is fully ordered and decreed by the most reverend father in God, *Thomas* archbishop of *Canterbury*, primate and metropolitane of *England*; *Thomas* lord *Wryothestly*, lord chancellor of *England*; *William* lord *St. John*, president of the king's majesty's council, and lord great master of his highness household; *John* lord *Ruffel*, lord privy seal; *Edward* earl of *Hertford*, lord great chamberlain of *England*; *John* viscount *Lisle*, high admiral of *England*; *Richard* *Lister* knight, chief justice of *England*; and *Roger* *Cholmely* knight, chief baron of his grace's exchequer; this present twenty-fourth day of *February*, anno Domini, secundum cursum & computationem ecclesie Anglicane, millesimo quingentesimo quadragesimo quinto, according to the statute in such case lately provided, that the citizens and inhabitants of the said city of *London*, and liberties of the same, for the time being, shall yearly without fraud or covin for ever pay their tithes to the parsons, vicars, and curates of the said city, and their successors for the time being, after the rate hereafter following; that is to wit, of every xs. rent by the year of all and every house and houses, shops, warehouses, cellars, stables, and every of them within the said city and liberty of the same, xvj d. ob.; and of every xxs. rent by the year of all and every such house and houses, shops, warehouses, cellars, and stables, and every of them within the said city and liberties, ijs. and ix d.;

Parsons, vicars, curates, tithes.

1545. and so above the rent of xx s. by the year, ascending from x s. to xx s. according to the rate aforesaid.

III. *Item*, That where any lease is or shall be made of any dwelling house or houses, shops, warehouses, cellars, or stables, or any of them, by fraud or covin, reserving less rent than hath been accustomed, or is, or that any such lease shall be made without any rent reserved upon the same, by reason of any fine or income paid beforehand, or by any other fraud or covin; that then in every such case the tenant or farmer, tenants and farmers thereof shall pay, for his or their tithes of the same, after the rate aforesaid, according to the quality of such rent or rents, as the same house or houses, shops, warehouses, cellars, or stables, or any of them were last letten for, without fraud or covin, before the making of such lease.

IV. *Item*, That every owner or owners, inheritor or inheritors of any dwelling house or houses, shops, warehouses, cellars, or stables, or any of them, within the said city and liberties, inhabiting or occupying the same himself or themselves, shall pay after such rate or tithes as is above said, after the quantity of such yearly rent as the same was last letten for, without fraud or covin.

Leases.

V. *Item*, If any person or persons have taken, or hereafter shall take any mease or mansion place by lease, and the taker or takers thereof, his or their executors or assigns, doth or shall inhabit in any part thereof, and have or hath within eight years last past before this order, or hereafter will or shall let out the residue of the same, that then in such case the principal farmer or farmers, or first taker or takers thereof, his or their executors or assigns, shall pay his or their tithes, after the rate aforesaid, according to his or their quantity therein, and that his or their executors, assignee or assignees, shall pay his or their tithes after the rate above said, according to the quantity of their rent by year.

VI. And that if any person or persons have, or shall take divers mansion houses, shops, warehouses, cellars, or stables, in one lease, and letteth, or shall let out one or more of the said houses, and keepeth or shall keep one or more in his or their own hands, and inhabiteth or inhabit in the same, that then the said taker or takers, and his and their executors or assigns shall pay his or their tithes after the rate above said, according to the quantity of the yearly rent of such mansion house or houses, retained in his or their hands; and that his assignee or assignees of the residue of the said mansion house or houses, shall pay his or their tithes after the rate above said, according to the quantity of their yearly rents.

VII. *Item*,

VII. *Item*, If such farmer or farmers, or his or their assigns of any mansion house or houses, warehouses, shops, cellars, or stables, hath at any time within eight years last past, or shall hereafter let over all the said mansion house or houses contained in his or their lease, to one person, or to divers persons, that then the inhabitants, lessees, or occupiers of them, and every of them, shall pay their tithes after the rate of such rents as the inhabitants, lessees, or occupiers, and their assignee or assignees have been or shall be charged withal, without fraud or covin. 1545.

VIII. *Item*, If any dwelling house, within eight years last past, was, or hereafter shall be, converted into a warehouse, storehouse, or such like, or if a warehouse, storehouse, or such like, within the said eight years, was, or hereafter shall be, converted into a dwelling house, that then the occupiers thereof shall pay tithes for the same, after the rate above declared of mansion house rents.

IX. *Item*, That where any person shall demise any dyehouse or brewhouse, with implements convenient and necessary for dying or brewing, reserving a rent upon the same, as well in respect of such implements, as in respect of such dyehouse or brewhouse, that then the tenant shall pay his tithes after such rate as is above said, the third penny abated: and that every principal house or houses, with key or wharf, having any crane or gibet belonging to the same, shall pay after the like rate of their rents, as is afore said, the third penny abated: and that other wharfs belonging to houses having no crane or gibet, shall pay for his tithes as shall be paid for mansion houses, in form afore said.

X. *Item*, That where any mansion house, with a shop, stable, warehouse, wharf with crane, timber yard, teinter yard, or garden, belonging to the same, or as parcel of the same, is or shall be occupied together, that if the same be hereafter severed or divided, or at any time within eight years last past were severed or divided, that then the farmer or farmers, occupier or occupiers thereof, shall pay such tithes as is above said, for such shops, stable, warehouses, wharf with crane, timber yard, teinter yard, or garden, afore said, so severed or divided, after the rate of their several rents thereupon reserved.

XI. *Item*, That the said citizens and inhabitants shall pay their tithes quarterly, that is to say, at the feast of *Easter*, the nativity of *St. John Baptist*, the feast of *St. Michael the Archangel*, and the nativity of our Lord, by even portions.

1545.

XII. *Item*, That every housholder paying ten shillings rent or above, shall, for him or her self, be discharged of their four offering days: but his wife, children, servant, or others of their family, taking the rights of the church at *Easter*, shall pay two-pence for their four offering-days yearly.

XIII. Provided always, and it is decreed, that if any house or houses which hath been or hereafter shall be letten for ten shillings rent by year, or more, be or hath, at any time within eight years last passed, or hereafter shall be divided and leased, into small parcels or members, yielding less yearly rent than ten shillings by the year; that then the owner or owners, if he or they dwell in any part of such house, or else the principal lessee and lessees, if the owner or owners do not dwell in some part of the same, shall from henceforth pay for his or their tithes after such rate of rent as the same house was accustomed to be letten for, before such division or dividing into parts or members; and the under farmer and farmers, lessee and lessees, to be discharged of all tithes for such small parcels, parts, or members, rented at less yearly rent than ten shillings by year, without fraud or covin, paying two-pence yearly for four offering-days.

XIV. Provided always, and it is decreed, that for such gardens as appertain not to any mansion-house, and which any person or persons holdeth or shall hold in his or their hands for pleasure, or to his own use; that the then person so holding the same shall pay no tithes for the same: but if any person or persons, which holdeth, or shall hold any such garden, containing half an acre or more, doth or shall make any yearly profit thereof by way of sale; that then he or they shall pay tithes for the same, after such rate of his rent, as is herein first above specified.

XV. Provided also, that if any such gardens now being of the quantity of half an acre, or more, be hereafter by fraud or covin divided into less quantity or quantities, then to pay tithe according to the rate abovesaid.

XVI. Provided always, that this decree shall not extend to the houses of great men, or noble men, or noble women, kept in their own hands, and not letten for any rent, which in times past hath paid no tithes, so long as they shall so continue unletten: nor to any halls of crafts or companies, so long as they be kept unletten, so that the same halls in times past have not used to pay any tithes.

XVII. Pro-

XVII. Provided always, and it is decreed, that this present order and decree shall not in anywise extend to bind or charge any sheds, stables, cellars, timber yards, ne teinter yards, which were never parcel of any dwelling-house, ne appertaining or belonging to any dwelling-house, ne have been accustomed to pay any tithes; but that the said citizens and inhabitants shall thereof be quit of payment of any tithes, as it hath been used and accustomed.

XVIII. Provided also, and it is decreed, that where less sum than after sixteen-pence halfpeny in the ten shillings rent, or less sum than two shillings nine-pence in the twenty shillings rent, hath been accustomed to be paid for tithes; that then in such places the said citizens and inhabitants shall pay but only after such rate as hath been accustomed.

XIX. *Item*, It is also decreed, that if any variance, controversy, or strife, do or shall hereafter arise in the said city for non-payment of any tithes; or if any variance or doubt arise upon the true knowledge or division of any rent or tithes, within the liberties of the said city, or of any extent or assessment thereof, or if any doubt arise upon any other thing contained within this decree; that then upon complaint made by the party grieved, to the mayor of the city of *London* for the time being, the said mayor, by the advice of council, shall call the said parties before him, and make a final end in the same, with costs to be awarded by the discretion of the said mayor and his assistants, according to the intent and purport of this present decree.

XX. And if the said mayor make not an end thereof within two months after complaint to him made, or if any of the said parties find themselves aggrieved, that then the lord chancellor of *England* for the time being, upon complaint to him made within three months then next following, shall make an end in the same, with such costs to be awarded as shall be thought convenient, according to the intent and purport of the said decree.

XXI. Provided always, that if any person or persons take any tenement for a less rent than it was accustomed to be letten for, by reason of great ruine or decay, brenning, or such like occasions or misfortunes; that then such person or persons, his executors or assigns, shall pay tithes only after the rate of the rent reserved in his or their lease, and none otherwise, as long as the same lease shall endure.

1548.

Stat. 2 & 3 Ed. VI. c. 13. A. D. 1548.

An Act for Payment of Tithes.

In what
manner
tithes ought
to be paid.

‘ WHERE in the parliament holden at *Westminster* the iv. day of *February* in the xxvij. year of the reign of the late king of most famous memory, king *Henry* the viij. there was an act made concerning payment of tithes predial and personal: and also in another parliament holden at *Westminster* the xxiv. day of *July* in the xxxij. year of the reign of the said late king *Henry* the viij. another act was made concerning the true payment of tithes and offerings; in which several acts many and divers things be omitted and left out, which were convenient and very necessary to be added to the same: in consideration, whereof, and to the intent the said tithes may be hereafter truly paid, according to the mind of the makers of the said acts, be it ordained and enacted by the king our sovereign lord, with the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, that not only the said acts made in the said xxvij. and xxxij. years of the reign of the said late king *Henry* the viij. concerning the true payment of tithes, and every article and branch therein contained, shall abide and stand in their full strength and virtue; but also be it further enacted by the authority of this present parliament, that every of the king’s subjects shall from henceforth truly and justly, without fraud or guile, divide, set out, yield and pay, all manner of their predial tithes in their proper kind as they rise and happen, in such manner and form as hath been of right yielded and payed within forty years next before the making of this act, or of right or custom ought to have been paid: and that no person shall from henceforth take or carry away any such or like tithes, which have been yielded or paid within the said forty years, or of right ought to have been paid, in the place or places titheable of the same, before he hath justly divided or set forth for the tithe thereof the tenth part of the same, or otherwise agreed for the same tithes with the parson, vicar, or other owner, proprietary or fermor of the same tithes; under the pain of forfeiture of treble value of the tithes so taken or carried away.

Every person shall set forth and pay his predial tithes.

The penalty for carrying corn or

II. And be it also enacted by the authority aforesaid, that at all times whensoever and as often as the said predial tithes shall be due

and

and at the tithing time of the same, it to be lawful to every party to whom any of the said tithes ought to be paid, or his deputy or servant, to view and see their said tithes to be justly and truly set forth and severed from the nine parts, and the same quietly to take and carry away : and if any person carry away his corn or hay or his other predial tithes, before the tithe thereof be set forth ; or willingly withdraw his tithes of the same or of such other things whereof predial tithes ought to be paid ; or do stop or let the parson, vicar, proprietor, owner or other their deputies or farmers, to view, take, and carry away their tithes as is abovesaid ; by reason whereof the said tithe or tenth is lost, impaired, or hurt ; that then upon due proof thereof made before the spiritual judge or any other judge to whom heretofore he might have made complaint, the party so carrying away, withdrawing, letting or stopping, shall pay the double value of the tenth or tithe so taken, lost, withdrawn or carried away, over and besides the costs, charges, and expences of the suit in the same : the same to be recovered before the ecclesiastical judge according to the king's ecclesiastical laws.

III. And be it further enacted by the authority aforesaid, that all and every person which hath or shall have any beasts or other cattle titheable, going, feeding, or depasturing in any waste or common ground, whereof the parish is not certainly known, shall pay their tithes for the increase of the said cattle so going in the said waste or common, to the parson, vicar, proprietor, portionary, owner, or other their farmers or deputies of the parish, hamlet, town, or other place, where the owner of the said cattle inhabiteth or dwelleth.

IV. Provided always, and be it enacted by the authority aforesaid, that no person shall be sued or otherwise compelled to yield, give or pay any manner of tithes for any manors, lands, tenements, or hereditaments, which by the laws and statutes of this realm or by any privilege or prescription, are not chargeable with the payment of any such tithes, or that be discharged by any composition real. 32 H. 8. c. 7. § 5.

V. Provided always, and be it enacted by the authority aforesaid, that all such barren heath or waste ground, other than such as be discharged for the payment of tithes by act of parliament, which before this time have lain barren and paid no tithes by reason of the same barrenness, and now be, or hereafter shall be improved and converted into arable ground or meadow, shall from henceforth, after the end and term of seven years next after such improvement

1548.

hay before
tithe be set
forth, or for
letting the
parson to
carry it.

Tithe of
cattle feed-
ing in a
waste where
the parish is
not known.

Lands dis-
charged of
tithe by pre-
scription or
composition.

The tithe of
barren heath
or waste
ground.

1548. provement fully ended and determined, pay tithe for the corn and hay growing upon the same; any thing in this act to the contrary in anywise notwithstanding.

VI. Provided always, and be it enacted by the authority aforesaid, that if any such barren, waste or heath ground, hath before this time been charged with the payment of any tithes, and that the same be hereafter improved or converted into arable ground or meadow, that then the owner or owners thereof shall, during seven years next following from and after the same improvement, pay such kind of tithe as was paid for the same before the said improvement; any thing in this act to the contrary in anywise notwithstanding.

Who shall
pay their
personal
tithes.

VII. And be it also further enacted by the authority aforesaid, that every person exercising merchandises, bargaining and selling, clothing, handicraft or other art or faculty, being such kind of persons, and in such places, as heretofore within these forty years have accustomedly used to pay such personal tithes, or of right ought to pay, (other than such as been common day-labourers), shall yearly, at or before the feast of *Easter*, pay for his personal tithes the tenth part of his clear gains, his charges and expences, according to his estate, condition, or degree, to be therein abated, allowed, and deducted.

Handi-
craftsmen
having used
to pay tithes.

VIII. Provided always, and be it enacted, that in all such places where handicraftsmen have used to pay their tithes within these forty years, the same custom of payment of tithes to be observed and to continue; any thing in this act to the contrary notwithstanding.

The ordi-
nary may
examine
him that re-
fuseth to
pay his
tithe.

IX. And be it also enacted by the authority aforesaid, that if any person refuse to pay his personal tithes in form aforesaid, that then it shall be lawful to the ordinary of the same diocese where the party that so ought to pay the said tithes is dwelling, to call the same party before him, and by his discretion to examine him by all lawful and reasonable means, other than by the parties own corporal oath, concerning the true payment of the said personal tithes.

Payment of
offerings.

X. Provided always, and be it enacted by the authority aforesaid, that all and every person and persons, which by the laws or customs of this realm ought to make or pay their offerings, shall yearly, from henceforth, well and truly content and pay his or their offerings to the parson, vicar, proprietor, or their deputies or farmers, of the parish or parishes where it shall fortune or hap-
pen

pen him or them to dwell or abide; and that at such four offering days, as at any time heretofore within the space of four years last past, hath been used and accustomed for the payment of the same, and in default thereof to pay for their said offerings at *Easter* then next following. 1548.

XI. Provided also, and be it enacted by the authority aforesaid, that this act, or any thing therein contained, shall not extend to any parish which stands upon and towards the sea-coasts, the commodities and occupying whereof consisteth chiefly in fishing, and have, by reason thereof, used to satisfy their tithes by fish; but that all and every such parish and parishes shall hereafter pay their tithes according to the laudable customs, as they have heretofore of ancient time within these forty years used and accustomed, and shall pay their offerings as is aforesaid. Tithe of fish.

XII. Provided always, and be it enacted by the authority aforesaid, that this act, or any thing therein contained, shall not extend in anywise to the inhabitants of the city of *London* and *Canterbury*, and the suburbs of the same, ne to any other town or place that hath used to pay their tithes by their houses, otherwise than they ought or should have done before the making of this act; any thing contained in this act to the contrary in anywise notwithstanding. Payment of tithe by houses.

XIII. And be it further enacted by authority aforesaid, that if any person do substract or withdraw any manner of tithes, obventions, profits, commodities, or other duties before mentioned, or any part of them, contrary to the true meaning of this act, or of any other act heretofore made, that then the party so substracting or withdrawing the same, may or shall be convented and sued in the king's ecclesiastical court, by the party from whom the same shall be substracted or withdrawn, to the intent the king's judge ecclesiastical shall and may then and there hear and determine the same, according to the king's ecclesiastical laws: and that it shall not be lawful unto the parson, vicar, proprietor, owner, or other their farmers or deputies, contrary to this act, to convent or sue such withholder of tithes, obventions, and other duties aforesaid, before any other judge than ecclesiastical. And if any archbishop, bishop, chancellor, or other judge ecclesiastical, give any sentence in the foresaid causes of tithes, obventions, profits, emoluments, and other duties aforesaid, or in any of them, (and no appeal ne prohibition hanging), and the party condemned do not obey the said sentence, that then it shall be lawful to every such judge ecclesiastical Suits for withholding tithes shall be in the ecclesiastical court.
Excommunication of the party condemned.

1548.

ecclesiastical to excommunicate the said party so as afore condemned and disobeying; in the which sentence of excommunication, if the said party excommunicate wilfully stand and endure still excommunicate by the space of forty days next after, upon denunciation and publication thereof in the parish-church, or the place or parish where the party so excommunicate is dwelling, or most abiding, the said judge ecclesiastical may then, at his pleasure, signify to the king, in his court of chancery, of the state and condition of the said party so excommunicate, and thereupon to require process *de excommunicato capiendo*, to be awarded against every such person as hath been so excommunicate.

A copy of the libel shall be delivered to the judges before a prohibition granted.

XIV. Be it further enacted by the authority aforesaid, that if any party at any time hereafter, for any matter or cause before rehearsed, limited, or appointed by this act, to be sued or determined in the king's ecclesiastical court, or before the ecclesiastical judge, do sue for any prohibition in any of the king's courts where prohibitions before this time have been used to be granted, that then in every such case the same party, before any prohibition shall be granted to him or them, shall bring and deliver to the hands of some of the justices or judges of the same court where such party demandeth the prohibition, the very true copy of the libel depending in the ecclesiastical court, concerning the matter wherefore the party demandeth the prohibition, subscribed or marked with the hand of the same party; and under the copy of the said libel shall be written the suggestion wherefore the party so demandeth the said prohibition: and in case the said suggestion, by two honest and sufficient witnesses at the least, be not proved true in the court where the said prohibition shall be so granted, within six months next following after the said prohibition shall be so granted and awarded, that then the party that is letted or hindered of his or their suit in the ecclesiastical court by such prohibition, shall, upon his or their request and suit, without delay, have a consultation granted in the same case, in the court where the said prohibition was granted; and shall also recover double costs and damages against the party that so pursued the said prohibition, the said costs and damages to be assigned or assessed by the court where the said consultation shall be so granted; for which costs and damages the party to whom they shall be awarded may have an action of debt by bill, plaint, or information, in any of the king's courts of record, wherein the defendant shall not wage his or their law, nor have any essoin or protection allowed or admitted.

A consultation granted for default of proving a suggestion.

XV. Provided

XV. Provided always, and be it enacted by the authority aforesaid, that this act, or any thing therein contained, shall not extend to give any minister or judge ecclesiastical, any jurisdiction to hold plea of any matter, cause, or thing, being contrary or repugnant to or against the effect, intent, or meaning of the statute of *Westminster* second, the fifth chapter, the statutes of *articuli cleri*, *circumspecte agatis*, *silva cædua*, the treatise *de regiâ prohibitione*, ne against the statute of *anno primo Edwardi tertii*, the tenth chapter, or any of them, ne yet hold plea in any matter whereof the king's court of right ought to have jurisdiction; any thing herein contained to the contrary in anywise notwithstanding.

1548.

Of what things a judge ecclesiastical shall not hold plea.

XVI. Provided nevertheless, where heretofore such a custom hath been in many parts of *Wales*, that of such cattel and other goods as hath been given with the marriage of any person, their tithes have been exacted and levied by the parsons and curates in those parts: which custom being dissonant from any part of this realm, as it seemed when the said country of *Wales* was, through civil dissension, unculted, for want of other sufficient profits that might otherwise grow to the curates and ministers there, to have been for that time tolerable: so now the country being well manured and husbanded, and the tithe is duly paid there of corn, hay, wool, and cheese, and of other increase of all manner of cattel, as it is commonly in all other parts of this realm, the same custom seems to be grievous and unreasonable, specially where the benefices are else sufficient for the finding of the said ministers and curates: that it be therefore enacted by the authority aforesaid, that, from and after the first day of *May* next coming, no such tithes of marriage goods be exacted or required of any person within the said dominion of *Wales*, or marches of the same; any thing in this act contained, or any other act, custom, or prescription, had or made to the contrary hereof notwithstanding.

No tithes of marriage goods shall be paid in *Wales*, &c.

Stat. 13 Eliz. c. 20. A. D. 1570.

An Act touching Leases of Benefices, and other ecclesiastical Livings with Cure.

THAT the livings appointed for ecclesiastical ministers may not by corrupt and indirect dealings be transferred to other uses; be it enacted by the authority of this present parliament, that no lease after the fifteenth day of *May* next following the beginning of

How long the lease of a benefice shall endure.

1570. of this parliament, to be made of any benefice or ecclesiastical promotion with cure, or any part thereof, and not being impropriated, shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice without absence above fourscore days in any one year; but that every such lease, so soon as it or any part thereof shall come to any possession or use above forbidden, or immediately upon such absence, shall cease and be void; and the incumbent so offending shall for the same lose one year's profit of his said benefice, to be distributed by the ordinary among the poor of the parish: and that all chargings of such benefices with cure hereafter with any pension, or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this act, shall be utterly void.

Farther provisions relating hereto.

No benefice with cure shall be charged with a pension.

The parson's lease to his curate.

II. Provided, that every parson by the laws of this realm allowed to have two benefices, may demise the one of them upon which he shall not then be most ordinarily resident, to his curate only; that shall there serve the cure for him; but such lease shall endure no longer than during such curate's residence without absence above forty days in any one year: this act to continue to the end of the next parliament. 3 Car. c. 4, made perpetual. *Note, that in this statute, these words 'so soon as it or any part thereof' shall come to any possession or use above forbidden, or' are repealed.*

Stat. 18 Eliz. c. 11. A.D. 1576.

In what case sequestration may be granted by the ordinary of a benefice demised contrary to the statute.

VII. **A**ND whereas, in one other statute made in the said thirteenth year of her majesty, intituled, *An act touching leases of benefices, and other ecclesiastical livings with cure*, one clause is contained, that the incumbent offending the purport of the said statute, shall, for the same, lose one year's profit of his said benefice, to be distributed by the ordinary among the poor of the parish, as by the said branch in the said last-recited statute appeareth: be it therefore enacted by the authority aforesaid, that after complaint made to the ordinary, and sentence given upon any offence committed by the incumbent, whereby he shall or ought to lose one year's profit of his benefice as afore shewed, that the ordinary, within two months after such sentence given, and request to him made by the churchwardens of the said parish, or one of them, shall grant the sequestration of such profits to such inhabitant or inhabitants

inhabitants within the parish where such benefice shall be, as to him shall seem meet and convenient; and upon default therein by the ordinary, that it may and shall be lawful to every parishioner where the benefice is, to retain and keep his or their tithes, and likewise for the churchwardens of the said parish, to enter and take the profits of the glebe lands, and other rents and duties of every such benefice, to be employed to the use of the poor as afore-said, until such time as sequestration shall be committed by the ordinary, and then, as well the churchwardens as the parishioners, to yield account of, and make payment to him or them to whom such sequestration shall be committed; and that he or they, to whom such sequestration shall be committed from time to time, shall justly and truly employ and bestow the said profits, or the true and just value thereof, without fraud or guile, to such uses as by the said statute is limited and appointed, upon pain of forfeiture of the double value of such withholden profits, to be recovered in the ecclesiastical court by the poor of the said parish.

1576.

In what case
the parishioners may
retain the
tithes.

Die Veneris 8^a Novembris 1644.

An ORDINANCE of the LORDS and COMMONS, assembled in Parliament, for the true Payment of Tythes and other such Duties, according to the Laws and Customs of the Realm.

‘WHEREAS divers persons within the realme of *England*, and dominion of *Wales*, taking advantage of the present distractions, and ayming at their own profit, have refused, and still do refuse, to set out, yeeld, and pay tythes, offerings, oblations, obventions, and other such duties, according to the law of the said realm, to which they are the more incouraged, both because there is not now any such compulsory meanes for recovery of them by any ecclesiastical proceedings as heretofore hath been, and also for that by reason of the present troubles there cannot be had speedie remedie for them in the temporal courts, although they remaine still due, and of right payable, as in former times;’ be it therefore declared and ordained by the lords and commons in parliament assembled, that every person and persons whatsoever within the said realme and dominion, shall fully, truly, and effectually set out, yeeld, and pay respectively all and singular tithes, offerings, oblations, obventions, rates for tythes, and all other duties commonly knowne by the name of Tythes, and all arrears of them re-

1644.

pectively, to all and every the respective owners, proprietors, impropietors, and possessors, as well lay as ecclesiastical respectivelie, their executors and administrators, of parsonages, vicarages, or rectories, either impropriate, or presentative, or donative, and of vicarages, and of portions of tythes respectively, within the said realme and dominion, according to the law, custome, prescription, composition, or contract respectively, by which they or any of them ought to have been set out, yeilded, and paid at the beginning of this present parliament, or two yeares before; and in all and every case where any person or persons hath at any time since the beginning of this present parliament, or two yeeres before, substracted, withdrawn, or failed, in due payment of, or hereafter at any time shall substract, withdraw, or faile in due payment of any such tythes, offerings, oblations, obventions, rates for tythes, or any duty knowne by the name of Tythes, or arreares of them, or any of them, as aforesaid, the person or persons to whom the same is, hath been, or shall be respectively due, his executors or administrators, shall and may make his and their complaint thereof to any two justices of peace within the same countie, citie, towne, place, riding, or division, not being patron or patrons of the church where such substraction, withdrawing, or faile of payment hath been, or shall be, nor being interested any way in the things in question; which justices of peace are authorized hereby, and shall have full power to summon, by reasonable warning before-hand, all and every such person or persons against whom any such complaints shall be made to them, and after his or their appearance before them, or upon default made after the second summons, the said summons being made as aforesaid, and proved before the said justices by oath, which said justices shall hereby have power to administer the same, to heare and determine the said complaint, by sending for and examining witnesses upon oath, which said oath the said justices are hereby also authorized to minister, and admitting other proofs brought on either side, and thereupon shall, in writing under their hands and seale, adjudge the case, and give reasonable costs and dammages to either party, as in their judgement they shall thinke fit.

And be it further ordained by the authoritie aforesaid, that if any person or persons shall refuse to pay any such tithes or summes of money as upon such complaint and proceeding shall be by any such justices of peace adjudged as aforesaid, and shall not within

thirtie

thirte daies next after notice of judgement, in writing under the hand and seale of such justices of peace given to him or them, make full satisfaction thereof according to the said judgement, in every such case the person and persons respectivelie to whom any such tithes or summes of money shall be upon such judgement due, shall and may by warrant from the said justices, or either of them, distraine all and everie, or any the goods and chattels of the partie or parties so refusing, and of the same make sale, and retaine to himself or themselves so much of the monies raised by sale thereof as may satisfie the said judgement, returning the overplus thereof to the partie or parties so refusing; and in case no sufficient distress can be found, that then the said justices of peace, or any other justices of peace of the same countie as aforesaid, shall and may commit all and every such person and persons so refusing to the next common goale of the said countie, there to remaine in safe custodie, without baile or maineprize, until he or they respectivelie shall make full satisfaction according to the said judgement.

Provided alwaies, and it is further ordained by the authority aforesaid, that if any person or persons shall thinke him or themselves unjustly dealt with by or in any such judgement as aforesaid, then he or they respectivelie shall and may thereof complaine to the high court of chancerie, where the cause between the parties shall be againe heard and determined; which court shall hereby have full power and authoritie to summon the parties, and to heare and determine the same; and to suspend execution as the same court shall see cause; and to give finall judgement therein, with reasonable costs, to the partie or parties grieved by any such complaint brought before them.

Provided alwaies, that this ordinance, or any thing therein contained, shall not extend to any tithes, offerings, yecrely-payments, or other ecclesiastical duties, due or to be due for any houses, buildings, or other hereditaments, within the citie of *London*, or the liberties thereof, which be otherwise provided for by act of parliament.

1670.

Stat. 22 & 23 Car. II. c. 15. A. D. 1670.

An Act for the better Settlement of the Maintenance of the Parsons, Vicars, and Curates, in the Parishes of the City of *London* burnt by the late dreadful Fire there.

The reasons
of the act.

• WHEREAS the tithes in the city of *London* were levied and paid with great inequality, and are since the late dreadful fire there, in the re-building of the same, by taking away of some houses, altering the foundations of many, and the new erecting of others, so disordered, that in case they should not for the time to come be reduced to a certainty, many controversies and suits of law might thence arise; be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, that the annual certain tythes of all and every parish and parishes within the said city of *London*, and the liberties thereof, whose churches have been demolished, or in part consumed by the late fire, and which said parishes by virtue of an act of this present parliament, intituled, *An additional act for the re-building of the city of London, uniting of parishes, and re-building of the cathedral and parochial churches within the said city*, remain and continue single, as heretofore they were, or are by the said act annexed or united into one parish respectively, shall be as followeth; (that is to say), the annual certain tythes, or sum of money in lieu of tythes,

22 Car. 2.
c. 11.

II. OF the parish of *Albhallows, Lombard street*, one hundred and ten pounds, cx l.

2. Of *St. Bartholomew Exchange*, one hundred pounds, c l.

3. Of *St. Bridget*, alias *Brides*, one hundred and twenty pounds, cxx l.

4. Of *St. Bennet Finck*, one hundred pounds, c l.

5. Of *St. Michael Crooked-lane*, one hundred pounds, c l.

6. Of *St. Christopher*, one hundred and twenty pounds, cxx l.

7. Of *St. Dionis Backchurch*, one hundred and twenty pounds, cxx l.

8. Of *St. Dunstan in the east*, two hundred pounds, cc l.

9. Of *St. James Garlick Hythe*, one hundred pounds, c l.

10. Of *St. Michael Cornhill*, one hundred and forty pounds, cxl l.

11. Of

11. Of *St. Michael Bassishaw*, one hundred thirty and two pounds and eleven shillings, cxxxii l. xi s. 1670.
12. Of *St. Margaret Lothbury*, one hundred pounds, c l.
13. Of *St. Mary Aldermanbury*, one hundred and fifty pounds, dl.
14. Of *St. Martin Ludgate*, one hundred and sixty pounds, dxi l.
15. Of *St. Peter Cornhill*, one hundred and ten pounds, cx l.
16. Of *St. Stephen Coleman-street*, one hundred and ten pounds, cx l.
17. Of *St. Sepulchre*, two hundred pounds, cc l.
18. Of *Albhallows Bread-street*, and *St. John Evangelist*, one hundred and forty pounds, cxl l.
19. Of *Albhallows the Great*, and *Albhallows the Less*, two hundred pounds, cc l.
20. Of *St. Alban Wood-street*, and *St. Olaves Silver-street*, one hundred and seventy pounds, clxx l.
21. Of *St. Anne and Agnes*, and *St. John Zachary*, one hundred and forty pounds, cxl l.
22. Of *St. Augustine* and *St. Faith*, one hundred seventy and two pounds, clxxii l.
23. Of *St. Andrew Wardrobe*, and *St. Anne Blackfryers*, one hundred and forty pounds, cxl l.
24. Of *St. Antholin*, and *St. John Baptist*, one hundred and twenty pounds, cxx l.
25. Of *St. Bennet Gracechurch*, and *St. Leonard Eastcheap*, one hundred and forty pounds, cxl l.
26. Of *St. Bennet Pauls-wharf*, and *St. Peters Pauls-wharf*, one hundred pounds, c l.
27. Of *Christ Church*, and *St. Leonard Foster-lane*, two hundred pounds, cc l.
28. Of *St. Edmond the King*, and *St. Nicholas Acons*, one hundred and eighty pounds, clxxx l.
29. Of *St. George Bstolph-lane*, and *St. Bstolph Billingsgate*, one hundred and eighty pounds, clxxx l.
30. Of *St. Lawrence Jewry*, and *St. Magdalen Milk-street*, one hundred and twenty pounds, cxx l.
31. Of *St. Magnus*, and *St. Margaret New Fish-street*, one hundred and seventy pounds, clxx l.
32. Of *St. Michael Royal*, and *St. Martin Vintry*, one hundred and forty pounds, cxl l.

1670.

33. Of *St. Matthew Friday-street*, and *St. Peter Cheap*, one hundred and fifty pounds, cl l.
34. Of *St. Margaret Pattons*, and *St. Gabriel Fenchurch*, one hundred and twenty pounds, cxx l.
35. Of *St. Mary at Hill*, and *St. Andrew Hubbard*, two hundred pounds, cc l.
36. Of *St. Mary Woolnoth*, and *St. Mary Woolchurch*, one hundred and sixty pounds, clx l.
37. Of *St. Clement Eastcheap*, and *St. Martin Orgars*, one hundred and forty pounds, cxl l.
38. Of *St. Mary Abchurch*, and *St. Lawrence Pountney*, one hundred and twenty pounds, cxx l.
39. Of *St. Mary Aldermay*, and *St. Thomas Apostles*, one hundred and fifty pounds, cl l.
40. Of *St. Mary le Bow*, *St. Pancras Soper Lane*, and *Albhallows Honey Lane*, two hundred pounds, cc l.
41. Of *St. Mildred Poultry*, and *St. Mary Cole Church*, one hundred and seventy pounds, clxx l.
42. Of *St. Michael Wood Street*, and *St. Mary Staining*, one hundred pounds, c l.
43. Of *St. Mildred Bread Street*, and *St. Margaret Moses*, one hundred and thirty pounds, cxxx l.
44. Of *St. Michael Queenhyth*, and *Trinity*, one hundred and sixty pounds, clx l.
45. Of *St. Magdalen Old Fish Street*, and *St. Gregory*, one hundred and twenty pounds, cxx l.
46. Of *St. Mary Somerset*, and *St. Mary Mountbaw*, one hundred and ten pounds, cx l.
47. Of *St. Nicholas Cole Abby*, and *St. Nicholas Olaves*, one hundred and thirty pounds, cxxx l.
48. Of *St. Olave Jewry*, and *St. Martin Ironmonger Lane*, one hundred and twenty pounds, cxx l.
49. Of *St. Stephen Walbrook*, and *St. Bennet Sheerhogg*, one hundred pounds, c l.
50. Of *St. Swythyn*, and *St. Mary Bothaw*, one hundred and forty pounds, cxl l.
51. Of *St. Vedast*, alias *Fosters*, and *St. Michael Quern*, one hundred and sixty pounds, clx l.

The rate-
tithes shall
be paid, be-

III. Which respective sums of money to be paid in lieu of tythes within the said respective parishes, and assessed as herein-after is directed,

directed, shall be, and continue to be esteemed, deemed, and taken, 1670.
to all intents and purposes, to be the respective certain annual main-
tenance (over and above glebes and perquisites, gifts and bequests, sides glebes,
perquisites,
and be-
quests.
to the respective parson, vicar, and curate, of any parish for the
time being, or to his or their respective successors, or to other per-
sons for his or their use) of the said respective parsons, vicars, and
curates, who shall be legally instituted, inducted, and admitted into
the respective parishes aforesaid.

IV. And that the said several sums of money for tythes, may be Who to
make the
assessments,
and when.
more equally assessed upon the several houses, buildings, and all
other hereditaments whatsoever, within all the said respective pa-
rishes; be it enacted by the authority aforesaid, that the alderman
of such respective ward or wards within the said city, wherein any
of the said parishes respectively lie, and his or their deputy or de-
puties, and the common council-men of such respective ward or
wards, with the churchwardens, and one or more of the parishion-
ers of such respective parish, wherein the maintenance aforesaid is re-
spectively to be assessed, to be nominated by such respective alder-
man, deputy, common-councilmen, and churchwardens, or any
five of them, whereof the alderman or his deputy to be one, shall at
some convenient and seasonable time before the twentieth day of
May, in the year of our Lord God one thousand six hundred and
seventy-one, assemble and meet together in some convenient place
within every of the respective parishes, in such respective ward
wherein the maintenance aforesaid is to be assessed; and they or
the major part of them so assembled, shall proportionably assess upon
all houses, shops, warehouses, and cellars, wharfs, keys, cranes,
water-houses, (which water-houses shall pay in their respective
parishes where they stand, and not elsewhere), and tofts of
ground, (remaining unbuilt), and all other hereditaments whatso-
ever, (except parsonage and vicarage houses), the whole respective
sum by this act appointed, or so much of it as is more than what
each impropiator is by this act enjoined respectively to allow, in
the most equal way that the said assessors, according to the best of
their judgements, can make it; which said assessments shall be made
and finished before the four and twentieth day of *July* then next en-
suing.

V. And be it further enacted by the authority aforesaid, that if If any va-
riance arise
upon the
assessments,
who to de-
termine it.
any variance or doubt shall happen or arise about any sum so assessed
as aforesaid, or that any parishioner or parishioners, or owner or
owners of any house, shop, warehouse, or cellar, wharf, key,

1670. crane, water-house, toft of ground, or other hereditament within any of the said parishes, shall find himself or themselves aggrieved by the assessing of any sum or sums of money, in manner and form aforesaid, that then upon complaint made by the party or parties aggrieved, to the lord mayor and court of aldermen of the said city, within fourteen days after notice given to the party or parties assessed, of such assessment made, the said lord mayor and court of aldermen summoning as well the party or parties aggrieved, as the alderman and such others as made the said assessment, shall hear and determine the same in a summary way, and the judgement by them given shall be final, and without appeal.

A review, if occasion be, of any assessment.

VI. Provided always, and be it enacted, that any assessment or rate to be made or laid by virtue of this act, shall or may in all or any the parishes aforesaid, in like manner, be reviewed, or altered, or laid again within three months after the twenty-fourth day of *June* one thousand six hundred and seventy-four, according to the aforesaid rules, and any such assessment or rate shall or may be again reviewed, or re-assessed, within three months after the twenty-fourth day of *June*, in the year of our Lord one thousand six hundred eighty-one; and that all and every such new assessment and rate shall be liable to the like appeals, as aforesaid, and shall be collected, levied, and paid, as any other assessment or rate mentioned in this act, may or ought to be.

If the persons appointed by this act refuse to act, then others to be chosen by the lord mayor, &c.

VII. And if the said alderman, deputy, common councilmen, and parishioner or parishioners so appointed as aforesaid, shall, after summons and request made in that behalf unto them, by the lord mayor and court of aldermen, or the incumbent or incumbents of any of the said respective parish or parishes, refuse and neglect to meet and make such assessments as aforesaid, then it shall and may be lawful to and for such person or persons as shall be thereunto authorized and required by the said lord mayor and court of aldermen, to make such assessment, as by the said aldermen, deputy, common-councilmen, churchwardens, parishioner or parishioners aforesaid, should or ought to have been made.

Three transcripts thereof to be made by the assessors;

VIII. And be it further enacted by the authority aforesaid, that the said assessors within ten days after such assessments made, and the respective appeals (if any be) determined, shall make three transcripts thereof in parchment, containing the respective sums to be payable, or appointed to be paid out of all and every the premises within such respective parish, and subscribe the same under their hands, and within twenty days after such subscription, as aforesaid,

aforesaid, one of the said transcripts shall be returned to the lord mayor of the city of *London*, to be kept and preserved by the said lord mayor, in and among the records of the said city, for a perpetual memorial thereof; and another of the said transcripts shall be returned into the registry of the lord bishop of *London*, to be kept and preserved, as aforesaid; and the other of the said transcripts shall remain and be kept in the vestry of such respective parish, for a perpetual memorial, as aforesaid.

IX. And for the surer and better payment of the said respective sums of money so to be assessed and taxed towards the raising of the said maintenance of the respective parsons, vicars, and curates of the said respective parishes, as aforesaid; be it further enacted by the authority aforesaid, that all and every such respective sum and sums of money so to be assessed and taxed, as aforesaid, towards the raising of the said maintenance of the said respective parsons, vicars, and curates, of the said respective parishes, shall be paid to the said respective parsons, vicars, and curates, and their successors respectively, at the four most usual feasts; (that is to say), at the annunciation of the blessed virgin *Mary*, the nativity of *St. John Baptist*, the feast of *St. Michael* the archangel, and the nativity of our Blessed Saviour, or within fourteen days after each of the feasts aforesaid, by equal payments; the respective payments thereof to begin and commence only from such time and times as the incumbent or incumbents of such respective parish shall begin to officiate or preach as incumbent or parson in the respective church belonging to such respective parish, or in some other convenient place or places in such respective parish or parishes, to be nominated or appointed by the lord bishop of *London* for the time being, or by the archbishop of *Canterbury*, in any place within his peculiars.

X. And in any parish or parishes where any impropriations be, be it enacted by the authority aforesaid, that all and every the impropriator or impropriators of any of the said parishes, shall pay and allow what really and *bona fide* they have used, and ought to pay and satisfy to the respective incumbent of such respective parish, at any time before the said late fire, and the same shall be esteemed and computed as part of the maintenance of such incumbent; notwithstanding this act, or any clause or matter, or thing therein contained.

XI. And be it further enacted by the authority aforesaid, that if any the inhabitants in any respective parish or parishes as aforesaid, shall or do refuse or neglect to pay to the respective incumbents

1670.

one to be returned to the lord mayor, another to the bishop of *London's* registry, the other to remain in the vestry.

When the same money shall be paid, and to whom.

Impropriators to make the same allowances they did before the fire.

Upon refusal of payment, how to levy it.

bents

1670. bents aforesaid, of any of the said respective parishes, any sum or sums of money to him respectively payable, or appointed to be paid by this act, or any part thereof, contrary to the true intent and meaning of this act, (being lawfully demanded at the house or houses, wharf, key, crane, cellar, or other premises, whereout the same is payable), that then it shall and may be lawful to and for the lord mayor of the city of *London* for the time being, upon oath to be made before him of such refusal or neglect, to give and grant out warrants for the officer or person appointed to collect the same, with the assistance of a constable in the day-time, to levy the same tythes or sums of money so due, and in arrear and unpaid, by distress and sale of the goods of the party or parties so refusing or neglecting to pay, restoring to the owner or owners the overplus of such goods, over and above the said arrears of the said monies so due and unpaid, and the reasonable charges of making such distress, which he is to deduct out of the monies raised by sale of such goods.

If the lord mayor refuse to execute this act, then who are appointed to execute it.

XII. Provided always, and be it enacted, that in case the lord mayor, or court of aldermen, shall refuse or neglect to execute any of the respective powers to them by this act granted, or to perform all and every such thing relating either to the assessing or levying of the respective sums aforesaid, as they are by this act authorized and required to perform, that then it shall and may be lawful for the lord chancellor, or lord keeper of the great seal of *England* for the time being, or any two or more of the barons of his majesty's court of exchequer, by warrant or warrants under his or their respective hands and seals, to do and perform what the said lord mayor and court of aldermen, according to the true intent and meaning of this present act, might or ought to have done, and by such warrant, either to empower any person or persons to make the respective assessments as aforesaid, or to authorize the respective officers or persons appointed to collect the sums aforesaid, to levy the same by distress and sale of the goods of any person or persons that shall refuse or neglect to pay the same, in manner and form aforesaid.

XIII. Provided always, and be it enacted, that where any of the parishes within the said city have, since the late fire, by death or otherwise, become vacant, the surviving or remaining incumbent of the other parish thereto united, or therewith consolidated, shall have and enjoy, and have like remedy to recover the tythes hereby settled to be paid, as if he had been actually presented, admitted, instituted, and inducted, into both the said parishes, since the union and consolidation thereof,

XIV. Proq-

XIV. Provided always, that no court or judge ecclesiastical or temporal, shall hold plea of or for any the sum or sums of money due and owing, or to be paid by virtue of this act, or any part thereof, other than the persons hereby authorized to have cognizance thereof; nor shall it be lawful to or for any parson, vicar, curate, or incumbent, to convent or sue any person or persons assessed as aforesaid, and refusing or neglecting to pay the same in any court or courts, or before any judge or judges, other than what are authorized and appointed by this act, for the hearing and determining of the same, in manner aforesaid.

1670.

No court whatsoever shall hold plea for any duty arising upon this act.

XV. Provided always, that it shall and may be lawful to and for the warden and minor canons of Saint *Paul's* church *London*, parson and proprietors of the rectory of the parish of Saint *Gregory* aforesaid, to receive and enjoy all tythes, oblations, and duties, arising or growing due within the said parish, in as large and beneficial manner as formerly they have, or lawfully might have done; any thing herein to the contrary notwithstanding.

An exception for St. Gregory's church, out of this act.

Stat. 7 & 8 W. III. c. 6. A. D. 1696.

An Act for the more easy Recovery of Small Tythes.

FOR the more easy and effectual recovery of small tithes, and the value of them, where the same shall be unduly substracted and detained; where the same do not amount to above the yearly value of forty shillings from any one person; be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all and every person and persons shall henceforth well and truly set out and pay all and singular the tithes, commonly called Small Tythes, and compositions and agreements for the same, with all offerings, oblations, and obventions, to the several rectors, vicars, and other persons, to whom they are or shall be due, in their several parishes within this kingdom of *England*, dominion of *Wales*, and town of *Berwick upon Tweed*, according to the rights, customs, and prescriptions, commonly used within the said parishes respectively; and if any person or persons shall hereafter substract or withdraw, or any ways fail in the true payment of such small tithes, offerings, oblations, obventions, or compositions as aforesaid, by the space of twenty days at most after demand thereof, then it

Continued further for 7 years by 10 & 11 W. 3. c. 15. and perpetuated by 3 & 4 Ann. c. 18. § 1.

Small tithes not paid in 20 days after demand,

1696.

lawful to
complain to
2 justices,
not interest-
ed,

who may
summon
the persons
complained
of, and on
default of
appearance
determine
the com-
plaint, and
give allow-
ance with
costs not
exceeding
10 s.

On refusal
to pay in 10
days after
notice, the
constables,
&c may
distrain, and
after 3 days
sell the
same, and
satisfy the
sum and
charges,
rendering
the over-
plus.

shall and may be lawful for the person or persons, to whom the same shall be due, to make his or their complaint, in writing, unto two or more of his majesty's justices of the peace within that county, riding, city, town corporate, place, or division, where the same shall grow due; neither of which justices of peace is to be patron of the church or chapel whence the said tithes do or shall arise, nor any ways interested in such tithes, offerings, oblations, obventions, or compositions aforesaid.

II. And be it further enacted by the authority aforesaid, that if hereafter any suit or complaint shall be brought to two or more justices of the peace as aforesaid, concerning small tithes, offerings, oblations, obventions, or compositions as aforesaid, the said justices are hereby authorized and required to summon, in writing under their hands and seals, by reasonable warning, every such person or persons against whom any complaint shall be made as aforesaid; and after his or their appearance, or upon default of their appearance, the said warning or summons being proved before them upon oath, the said justices of peace, or any two or more of them, shall proceed to hear and determine the said complaint, and upon the proofs, evidences, and testimonies, produced before them, shall, in writing under their hands and seals, adjudge the case, and give such reasonable allowance and compensation for such tithes, oblations, and compositions so subtracted or withheld, as they shall judge to be just and reasonable, and also such costs and charges, not exceeding ten shillings, as upon the merits of the cause shall appear just.

III. And be it further enacted, that if any person or persons shall refuse or neglect, by the space of ten days after notice given, to pay or satisfy any such sum of money, as upon such complaint and proceeding shall, by two or more justices of the peace, be adjudged as aforesaid, in every such case, the constables and churchwardens of the said parish, or one of them, shall, by warrant under the hands and seals of the said justices to them directed, distrain the goods and chattels of the party so refusing or neglecting as aforesaid, and after detaining them by the space of three days, in case the said sum so adjudged to be paid, together with reasonable charges for making and detaining the said distress, be not tendred or paid by the said party in the mean time, shall and may make publick sale of the same, and pay to the party complaining so much of the money arising by such sale, as may satisfy the said sum,

Sum so adjudged, retaining to themselves such reasonable charges for making and keeping the said distress, as the said justice shall think fit, and shall render the overplus (if any be) to the owner.

1696.

IV. Provided always, and be it enacted, that it shall and may be lawful for all justices of peace, in the examination of all matters offered to them by this act, to administer an oath or oaths to any witness or witnesses, where the same shall be necessary for their information, and for the better discovery of the truth.

Justices to
administer
an oath.

V. Provided also, and be it enacted, that this act, or any thing herein contained, shall not extend to any tithes, oblations, payments, or obventions, within the city of *London*, or liberties thereof, nor to any other city or town corporate where the same are settled by any act of parliament in that case particularly made and provided.

Not to ex-
tend to
London,
nor any
place other-
wise settled
by parlia-
ment.

VI. Provided also, and be it enacted, that no complaint for or concerning any small tithes, offerings, oblations, obventions, or compositions hereafter due, shall be heard and determined by any justices of the peace, by virtue of this act, unless the complaint shall be made within the space of two years next after the times that the same tithes, oblations, obventions, and compositions, did become due or payable; any thing in this act contained to the contrary notwithstanding.

No com-
plaint to be
heard, unless
made within
2 years.

VII. Provided also, and be it enacted, that any person finding him, her, or themselves aggrieved by any judgement to be given by any two justices of the peace, shall and may appeal to the next general quarter sessions to be held for that county, riding, city, town corporate or division, and the justices of the peace there present, or the major part of them, shall proceed finally to hear and determine the matter, and to reverse the said judgment, if they shall see cause; and if the justices then present, or the major part of them, shall find cause to confirm the judgment given by the first two justices of the peace, they shall then decree the same by order of sessions, and shall also proceed to give such costs against the appellant, to be levied by distress and sale of the goods and chattels of the said appellant, as to them shall seem just and reasonable; and no proceedings or judgment had, or to be had by virtue of this act, shall be removed or superseded by virtue of any writ of *certiorari*, or other writ out of his majesty's courts at *Westminster*, or any other court whatsoever, unless the title of such tithes, oblations, or obventions, shall be in question; any law, statute, custom, or usage, to the contrary notwithstanding.

Persons ag-
grieved to
appeal to
the Sessions,
who are to
determine
the matter.

If judgment
be confirm-
ed, justices
to give costs.

No judg-
ment to be
removed,
unless the
title be in
question.

1696.

Persons complained of, insisting on any composition, &c. and giving security to pay costs, justices not to give judgment.

And complainant may prosecute in any other court.]

Judgment to be inrolled at the next Sessions by the clerk of the peace,

and to bar vicars from any other remedy.

Persons removing, justices may certify the judgment,

VIII. Provided always, and be it enacted, that where any person or persons complained of for substracting or withholding any small tithes, or other duties aforesaid, shall before the justices of the peace to whom such complaint is made, insist upon any prescription, composition, or *modus decimandi*, agreement, or title, whereby he or she is or ought to be freed from payment of the said tithes, or other dues in question, and deliver the same in writing to the said justices of the peace, subscribed by him or her, and shall then give to the party complaining reasonable and sufficient security, to the satisfaction of the said justices, to pay all such costs and damages, as upon a trial at law to be had for that purpose, in any of his majesty's courts having cognizance of that matter, shall be given against him, her, or them, in case the said prescription, composition, or *modus decimandi*, shall not upon the said trial be allowed; that in that case the said justices of the peace shall forbear to give any judgment in the matter; and that then and in such case the person or persons so complaining shall and may be at liberty to prosecute such person or persons for their said substruction in any other court or courts whatsoever, where he, she, or they might have sued before the making of this act; any thing in this act to the contrary notwithstanding.

IX. And be it further enacted by the authority aforesaid, that every person and persons, who shall by virtue of this act obtain any judgment, or against whom any judgment shall be obtained, before any justices of the peace out of sessions, for small tithes, oblations, obventions, or compositions, shall cause or procure the said judgment to be inrolled at the next general quarter sessions to be holden for the said county, city, riding, or division; and the clerk of the peace for the said county, city, riding, or division, is hereby required, upon tender thereof, to inroll the same; and that he shall not ask or receive for the inrollment of any one judgment any fee or reward exceeding one shilling; and that the judgment so inrolled, and satisfaction made by paying the same sum so adjudged, shall be a good bar to conclude the said rectors, vicars, and other persons, from any other remedy for the said small tithes, oblations, obventions, or compositions, for which the said judgment was obtained.

X. And be it further enacted by the authority aforesaid, that if any person or persons, against whom any such judgment or judgments shall be had as aforesaid, shall remove out of the county, riding,

riding, city, or corporation, after judgment had as aforesaid; and before the levying the sum or sums thereby adjudged to be levied, the justices of the peace who made the said judgment, or one of them, shall certify the same, under his or their hands and seals, to any justice of peace of such other county, city, or place, wherein the said person or persons shall be inhabitants; which said justice is hereby authorized and required, by warrant under his hand and seal, to be directed to the constables or churchwardens of the place, or one of them, to levy the sum or sums so adjudged to be levied as aforesaid, upon the goods and chattels of such person or persons, as fully as the said other justices might have done, if he, she, or they had not removed as aforesaid; which shall be paid according to the said judgment.

1696.

and other
justices by
warrant
may levy
the sum ad-
judged.

XI. Provided always, and be it enacted, that no vicar or other person shall have remedy to recover small tithes, or other dues aforesaid, which became or were due before the making of this act, unless complaint be made to the justices of the peace in form aforesaid, before the first day of *October*, which shall be in the year of our Lord one thousand six hundred ninety-six.

Small tithes
to be recu-
vered before
1st October
1696.

XII. And it is hereby declared and enacted, that the said justices of the peace, who shall hear and determine any of the matters aforesaid, shall have power to give costs, not exceeding ten shillings, to the party prosecuted, if they shall find the complaint to be false and vexatious; which costs shall be levied in manner and form aforesaid.

Justices
may give
costs not
exceeding
10 s.

XIII. Provided also, and be it further enacted, that if any person or persons shall be sued for any thing done in execution of this act, and the plaintiff in such suit shall discontinue his action, or be nonsuit, or a verdict pass against him, that then, in any of the said cases, such person or persons shall recover double costs.

If the plain-
tiff be non-
suit, person
sued to have
double
costs.

XIV. Provided always, that any clerk, or other person or persons, who shall begin any suit for recovery of small tithes, oblations, or obventions, not exceeding the value of forty shillings, in his majesty's court of exchequer, or in any of the ecclesiastical courts, shall have no benefit by this act, or any clause in it, for the same matter for which he or they have so sued.

Suits for
tithes not
exceeding
40 s. to have
no benefit
by this act.

XV. Provided always, and be it further enacted, that this act shall continue for the space of three years, and from thence to the end of the next session of parliament, and no longer.

Act to con-
tinue 3
years.

1696.

Stat. 7 & 8 W. III. c. 34. A. D. 1696.

Quakers
refusing to
pay tithes
or church
rates.

Justices on
stating what
is due, may
direct pay-
ment.

On refusal,
to levy by
distress.

Persons
aggrieved
may appeal
to the quar-
ter sessions,
who are
finally to
determine.

If judgment
be contin-
ued, to
give costs.

IV. **W**HEREAS by reason of a pretended scruple of conscience, quakers do refuse to pay tythes and church-rates, be it enacted by the authority aforesaid, that where any quaker shall refuse to pay, or compound for his great or small tythes, or to pay any church-rates, it shall and may be lawful to and for the two next justices of peace of the same county, (other than such justice of the peace as is patron of the church or chapel whence the said tythes do or shall arise, or any ways interested in the said tythes), upon the complaint of any parson, vicar, farmer, or proprietor of tythes, churchwarden or churchwardens, who ought to have, receive, or collect the same, by warrant under their hands and seals, to convene before them such quaker or quakers neglecting or refusing to pay or compound for the same, and to examine upon oath, (which oath the said justices are hereby empowered to administer), or in such manner as by this act is provided, the truth and justice of the said complaint, and to ascertain and state what is due and payable by such quaker or quakers to the party or parties complaining, and by order under their hands and seals to direct and appoint the payment thereof, so as the sum ordered, as aforesaid, do not exceed ten pounds; and upon refusal by such quaker or quakers to pay according to such order, it shall and may be lawful to and for any one of the said justices, by warrant under his hand and seal, to levy the money thereby ordered to be paid, by distress and sale of goods of such offender, his executors or administrators, rendering only the overplus to him, her, or them, necessary charges of distraining being thereout first deducted and allowed by the said justice; and any person finding him, her, or themselves, aggrieved by any judgment given by such two justices of the peace, shall and may appeal to the next general quarter sessions to be held for the county, riding, city, liberty, or town corporate; and the justices of the peace there present, or the major part of them, shall proceed finally to hear and determine the matter, and to reverse the said judgment, if they shall see cause; and if the justices then present, or the major part of them, shall find cause to continue the judgment given by the first two justices of the peace, they shall then decree the same by order of sessions, and shall also proceed to give such costs against the appellant, to be levied by distress and sale of the goods and chattels of the said appellant, as to them shall seem just

just and reasonable; and no proceedings or judgment had or to be had by virtue of this act, shall be removed or superseded by any writ of *certiorari*, or other writ out of his majesty's courts at *Westminster*, or any other court whatsoever, unless the title of such tythes shall be in question.

1696.

No judgment to be superseded.

V. Provided always, that in case any such appeal be made as aforesaid, no warrant of distress shall be granted until after such appeal be determined.

No distress till appeal be determined.

VII. Provided, that this act shall continue in force for the space of seven years, and from thence to the end of the next session of parliament, and no longer. [*Extended to all ecclesiastical dues, by 1 G. 1. c. 6. § 2.*]

Stat. 11 & 12 W. III. c. 16. A. D. 1699.

An Act for the better ascertaining the Tythes of Hemp and Flax.

‘WHEREAS an act, made in the third year of the reign of his majesty and the late queen, intituled, *An act for the better ascertaining the tythes of hemp and flax*, was made to continue but for seven years, and to the end of the next session of parliament after such term ended, and is now expired: and whereas the said act hath by experience been found very useful and necessary; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that, from and after the five and twentieth day of *March*, which shall be in the year of our lord one thousand seven hundred, all and every person or persons, who shall sow or cause to be sown any hemp or flax in any parish or place in the kingdom of *England*, dominion of *Wales*, and town of *Berwick upon Tweed*, shall pay or cause to be paid to every parson, vicar, or impropriator of any such parish or place, yearly and every year, the sum of five shillings, and no more, for each acre of hemp and flax so sown, before the same be carried off the ground, and so proportionably for more or less ground so sown; for the recovery of which sum or sums of money, the parson, vicar, or impropriator, shall have the common and usual remedy allowed of by the laws of the land.

Preamble; Cap. 3.

Ground sown with flax or hemp, to pay 5 s. per acre.

1700.

Lands dis-
charged by
modus deci-
mandi not to
be charged.

Not to alter
payment of
tythes for
ground
sown with
hemp or
flax between
2 Feb. 1684.
and 2 Feb.
1691.

An Act to con-
tinue 7
years.

II. Provided, that this act; or any thing therein contained, shall not extend to charge any lands discharged by any *modus decimandi*, ancient composition, or otherwise discharged of tythes by law.

III. Provided always, that nothing herein contained shall extend, or be construed to extend, to make any alteration in the right or manner of payment of tythes of flax and hemp to any ecclesiastical person, incumbent of any parsonage or curacy, or to any impropricator or body corporate, having or holding any impropriation, for such ground as hath at any time since the second day of *February* one thousand six hundred eighty-four, and before the second day of *February* one thousand six hundred ninety-one, been sown with flax or hemp, and paid tythe in kind to such incumbent, impropricator, or body corporate, respectively, but that the same shall continue and be payable and paid, as fully and in such manner as formerly; any thing in this act to the contrary notwithstanding.

IV. Provided, that this law shall continue in force for seven years, to be accounted from the said five and twentieth day of *March*, and from thence to the end of the next sessions of parliament, and no longer. [*Made perpetual by Stat. 1 G. 1. Stat. 2. c. 26. § 2.*]

Stat. 31 G. II. c. 12. A.D. 1758.

An Act to encourage the Growth and Cultivation of Madder in that Part of *Great Britain* called *England*, by ascertaining the Tythe thereof there.

Preamble.

‘ WHEREAS madder is an ingredient essentially necessary in dyeing and callicoe printing, and of great consequence to the trade and manufactures of this kingdom; and may be raised therein equal in goodness, if not superior, to any foreign madder: and whereas the encouraging of the growth thereof in this kingdom, will be a saving of a very large sum of money, which is now paid for that commodity imported duty free from abroad; and will also be a means of employing great numbers of poor in the winter months: and whereas the ascertaining of the tithe of madder will be the greatest means of encouraging the growth of that commodity in this kingdom:’ may it therefore please your majesty that it may be enacted, and be it enacted by the king’s most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament

ment assembled, and by the authority of the same, that, from and after the first day of *August*, which will be in the year of our Lord one thousand seven hundred and fifty-eight, all and every person and persons who shall plant, grow, raise, or cultivate, or cause to be planted, grown, raised, or cultivated, any madder in any parish or place within that part of *Great Britain* called *England*, shall pay, or cause to be paid, to every parson, vicar, curate, or impropriator of any such parish or place, the sum of five shillings, and no more, yearly, and every year, for each acre of madder so planted, grown, raised, or cultivated, and so proportionably for more or less ground so planted or cultivated, in lieu of all manner of tithe of madder; for the recovery of which sum or sums of money, the parson, vicar, or impropriator, shall have the common and usual remedy allowed of by the laws of this realm.

1758.

Madder to
pay 5 s. per
acre, tithe;

II. Provided always, and be it enacted by the authority aforesaid, that no madder shall be carried off the ground on which it grows, before the sum or sums of money herein-before directed to be taken in lieu of tithes, be paid to the person or persons respectively entitled to receive the same.

and not to
be removed
till tithe be
paid.

III. Provided also, that this act, or any thing herein contained, shall not extend to charge any lands discharged by any *modus decimandi*, ancient composition, or other discharge of tithes by law.

Act not to
extend to
lands dis-
charged of
tithes, &c.;

IV. Provided always, and be it enacted by the authority aforesaid, that this act shall continue and be in force for the space of fourteen years, and from thence to the end of the then next session of parliament, and no longer. [Continued by 5 G. 3. c. 18.]

and to be in
force 14
years.

Stat. 5 G. III. c. 17. A. D. 1765.

An Act to confirm all Leases already made by Archbishops and Bishops, and other ecclesiastical Persons, of Tythes and other Incorporeal Hereditaments, for One, Two, or Three Life or Lives, or Twenty-one Years; and to enable them to grant such Leases, and to bring Actions of Debt for Recovery of Rents reserved and in Arrear on Leases for Life or Lives.

WHEREAS it may be doubtful, whether, by the laws now in being, archbishops or bishops, masters and fellows, or any other head and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, or

Preamble;

any

1765.

any other person or persons having any spiritual or ecclesiastical promotions, heretofore had, or now have, any power to make or grant any lease or leases of tythes, or other incorporeal hereditaments only, which lie in grant and not in livery, for one, two, or three lives, or for any term or terms of years not exceeding twenty-one years, although the ancient rent or yearly sum is thereby mentioned to be reserved, and all other requisites prescribed by the acts of parliament now in being to that end, or any of them, were or are justly and truly observed and performed, by reason that there is generally no place wherein a distress can be had or taken for such rent or yearly sum; and it may be also doubtful whether, in cases of such leases for life or lives, there is any remedy in law for such ecclesiastical or other persons, by action of debt or otherwise, for recovering the rent or yearly sum due and in arrear which is mentioned to be reserved on such leases for life or lives: therefore, for obviating all doubts touching the same, and enabling the said archbishops and bishops, masters and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and other ecclesiastical persons, to make valid leases of such their incorporeal hereditaments, and to recover the rents or yearly sum mentioned to be reserved on any leases by them already granted, or to be granted, for one, two, or three lives, as aforesaid; and also to make good and effectual all such leases as have already been granted by them, or any of them: may it please your majesty that it may be enacted, and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all leases for one, two, or three life or lives, or any term not exceeding twenty-one years, already made and granted, or which shall at any time, from and after the passing of this act, be made or granted, of any tythes, tolls, or other incorporeal hereditaments, solely, and without any lands, or corporeal hereditaments, by any archbishop or bishop, master and fellows, or other head and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and every other person and persons who are enabled by the several statutes now in being, or any of them, to make any lease or leases for one, two, or three life or lives, or any term or number of years, not exceeding twenty-one years, of any lands, tenements, or other corporeal hereditaments,

Leases already made, or that shall be made, by ecclesiastical persons, of tythes and other incorporeal hereditaments for life or lives, or years, declared to be good in law,

reditaments, shall be, and are hereby deemed and declared to be, as good and effectual in law against such archbishop, bishop, masters, and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and other persons so granting the same, and their successors, and every of them, to all intents and purposes, as any lease or leases already made or to be made by any such archbishop or bishop, master and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and other persons having spiritual promotion, of any lands or other corporeal hereditaments now are, by virtue of the statute of the thirty-second year of king *Henry* the eighth, or any other statute now in being; any law, custom, or usage, to the contrary thereof in anywise notwithstanding.

1765.

as those
granted by
virtue of
act 32 Hen.
8.

II. Provided always, that nothing herein contained shall extend, or be construed to extend, to enable any master and fellows, or other head and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, or other ecclesiastical persons as aforesaid, to grant leases for any longer or other terms than, by the local statutes of their several foundations, they are now respectively enabled to do.

Masters and
fellows of
colleges,
&c. disabled
from grant-
ing leases
for any
longer term
than their
statutes
allow.

III. And be it further enacted and declared by the authority aforesaid, that in case the rent or rents, or yearly sum or sums, reserved or made payable in or by any lease or leases already made or to be made by any archbishop or bishop, master and fellows, or other head and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and every other person and persons so enabled to make leases as aforesaid for one, two, or three life or lives, or years, in pursuance of the several acts of parliament already in being, or by this present act, or any part thereof, shall be behind or unpaid by the space of twenty-eight days next over or after any of the days whereon the same, by such lease or leases, now are or hereafter shall or may be reserved and made payable, then, and so often, and from time to time, as it shall so happen, it shall and may be lawful for such archbishop or bishop, master and fellows, or other head and members of colleges or halls, deans and chapters, prebendaries, precentors, masters and guardians of hospitals, and other persons so making or granting, or having made or granted, such leases as aforesaid, or their executors, administrators, and successors respectively, to bring an action or actions of debt against the lessee or lessees to whom

Actions
may be
brought for
recovery of
rents re-
served and
in arrear on
leases for
life or lives.

1765. any such lease or leases for life or lives, or years, now are or hereafter shall be made and granted, his, her, or their heirs, executors, administrators, or assigns, for recovering the rent or rents which shall be then due and in arrear to any such archbishop or bishops, masters and fellows, or other heads and members of colleges or halls, deans, chapters, precentors, prebendaries, master and guardians of hospitals, and other person or persons before mentioned, his or their executors, administrators, or successors, in such and the same manner, and as fully and effectually to all intents and purposes, as any landlord or lessor, or other person or persons, could or might do for the recovering of arrears of rent due on any lease or leases for life or lives, or years, by the laws now in being; any law, statute, usage, or custom, to the contrary notwithstanding.

Publick act. IV. And it is hereby further enacted and declared by the authority aforesaid, that this act shall be deemed and taken to be a publick act; and shall be judicially taken notice of as such, in all courts of law and equity, without specially pleading the same.

87

A CATALOGUE of MONASTERIES of the yearly Value of 200 l. or upwards, dissolved by the Statute of 31 H. 8, and by that Means capable of being discharged of Tithes. In which are the following Abbreviations: A. Abbey; P. Priory; C. Aust. Canons of St. Austin; Bl. M. Black Monks; Wh. C. White Canons; Ben. Benedictines; Gilb. Gilbertines; Præm. Præmonstratenses; Carth. Carthusians; Mon. Monks; Clun. Cluniacs; Cist. Cistercians; N. Nuns; T. in the Time of; ab. about the Year. The Catalogue is extracted from Tanner's Notitia Monastica *.

BEDFORDSHIRE.

Monasteries,	Order.	Founded.	Value.
Elstow olim Heleneſtow, Elſtowe, or Alne- ſtowe A. - - }	Ben.	T. W. Conqr.	£. s. d. 284 12 11½
Dunſtapple P. - -	C. Auſt.	T. H. I.	344 13 3½
Wardon A. - - -	Ciſt.	1135	389 16 6½
Chickſand P. - -	Gilb.	ab. 1150	212 3 5½
Newenham P. - -	C. Auſt.	T. H. I.	293 5 11
Woburn A. - - -	Ciſt.	1145	391 18 7½

BERKS.

Abingdon A. - -	Ben.	ab. 670	1876 10 9
Bulterham, or Byſham- Montague A. - - }	C. Auſt.	13 E. III.	285 11 0½
Reading A. - -	Ben.	T. H. I.	1938 14 3½

* I refer to that work in its highly improved ſtate, as edited by the very learned and pious Dr. *James Naſmith*, whoſe virtues and talents have lately recommended him to the unſolicited patronage of his dioceſan, the honourable Dr. *James Yorke*, the preſent biſhop of Ely, and procured him from his lordſhip the valuable rectory of Leverington. This is not the only inſtance of that amiable prelate's purity and diſintereſtedneſs of motive in the diſtribution of his preferment.

A CATALOGUE

BUCKS.

Monasteries.	Order.	Founded.	Value.
Missenden A. - -	C. Aust.	1133	261 14 6
Noctele, Nuttley, or De Parco Crendon, or De Parco superThamam A. }	C. Aust.	1162	437 6 8
Asheridge, or Ashrug Coll. (a) - - }	C. Aust.	T. E. I.	416 16 4

CAMBRIDGESHIRE.

Ely P. (b) - - -	Ben.	ab. 970	1084 6 9½
Thorney, olim Ancorig A.	Ben.	972	411 12 11
Barnwell P. - -	C. Aust.	1092	256 11 10½

CHESHIRE.

St. Werburg's A. - -	Ben.	1093	1003 5 11
Combermere A. - -	Cift.	1133	225 9 7
Vale Royal, or De Valle Regali A. (c) - - }	Cift.	ab. 1266	518 19 8

CORNWALL.

Bodmin, olim Bosmanna P. (d) - - - }	C. Aust.	ab. 926	270 0 11
St. German's P. - -	C. Aust.	T. Ethelstan	227 4 8
Launceston, olim Lanstave-ton, i. e. Fanum S. Stephani P. - - }	C. Aust.	ab. 1126	354 0 11½

CUMBERLAND.

Carlol P. - - -	C. Aust.	T. W. Rufus	418 3 4½
Holm Cultram A. - -	Cift.	1150	477 19 3½

(a) This and Edindon in Wiltshire were houses of regulars within the meaning of 31 H. 8. c. 13. though generally called colleges.

(b) Omitted in the catalogues of *Mr Simon Dogge*, *Dr. Watfen*, bishop *Gibson*, and *Dr. Burn*.

(c) *Dugdale* having by mistaking the figure made the valuation of this house 118 l. only, instead of 518 l. it had not till now a place amongst the greater monasteries.

(d) i. e. *Masho monachorum*. *Leland. Collect.* vol. i. 75.

DERBYSHIRE.

OF MONASTERIES.

89

DERBYSHIRE.

Monasteries.	Order.	Founded.	Value.
			£. s. d.
Little Derby, Derleaga, or Darley A. - - }	C. Aust.	T. H. I.	258 14 5

DEVONSHIRE.

Tavystoke, or Tavestock A.	Ben.	981	902 5 7½
Plympton P. - -	C. Aust.	1121	912 12 8½
Hertland A. (e) - -	C. Aust.	T. H. II.	306 3 2½
Ford A. (f) - - -	Cist.	1141	373 10 6½
Buckfastre, or Buckfast- leigh A. - - - }	Cist.	1137	468 11 2½
Torr A. - - -	Præm.	1196	396 0 11
Dunkeswell A. - -	Cist.	1201	294 18 6
Newenham, or Neuham A.	Cist.	1246	227 7 8
Bockland Monachorum, or Buckland A. (g) - }	Cist.	1278	241 17 9½

DORSETSHIRE.

Shireburn A. - -	Ben.	ab. 870	682 14 7½
Shaftesbury, <i>olim Sceptonia</i> A.	Ben. N.	ab. 888	1166 8 9
Middleton, or Milton A. (h)	Ben.	ab. 933	578 13 11½
Cern, or Cernell A. -	Ben.	T. Edgar	515 17 10½

(e) The parish church of Hertland is commonly called Stoke, and the abbey itself is thence sometimes siled the abbey of Stoke.

(f) Said to be in Dorsetshire, Mon. Angl. tom. i. p. 785. It is indeed in the farthest limit between Dorsetshire and Somersetshire; but in all civil matters ever belonged to Devonshire, and in ecclesiastical was subject to the bishop of Exeter.

(g) In Devonshire, the name of Buckland Abbey, and the valuation of Plympton, are omitted in *Degge*, *Watson*, and *Gibson*'s catalogues. Plympton is put down, but instead of its own valuation hath that of Buckland put to it. Exeter St. James, a Cluniac priory, is put in, which was seized as alien, and given away by king Henry 6.

(h) This abbey is reckoned by Mr. *Speed* among his Wiltshire monasteries; and it is also falsely placed in that county by *Craffy*. Church Hist. lib. xxxi. c. 10. So likewise in *Anglia Sacra*, vol. i. p. 159. "vii. kal. Apr. 1287. Monasterium de Middleton in Wiltshire ignis consumpsit."

DORSETSHIRE

A CATALOGUE

DORSETSHIRE continued.

Monasteries.	Order.	Founded.	Value.
			£. s. d.
Tarent, (i) or Tarrant Kaines, Kaineston, or Kingston, olim Locus Benedictus Reginæ su- per Tarent, or Locus Reginæ super Tarent, A. - - - }	Cist. N.	1230	214 7 9
Abbotisbury, olim Abbo- desbirig A. - - }	Ben.	ab. 1016	390 19 2 $\frac{2}{3}$

DURHAM. (4)

Durham P. - - -	Ben.	ab. 842	1366 10 9 (1)
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ESSEX.

Berking, olim Berechinga, or Bedenham A. - - }	Ben. N.	675	862 12 5 $\frac{1}{2}$
Waltham A. - - -	C. Auf.	1062	900 4 3
Colchester A. - - -	Ben.	1096	523 16 0 $\frac{1}{2}$
Chich A. - - -	C. Auf.	ab. 1118	677 1 2
Stratford A. - - -	Cist.	1134	511 16 3 $\frac{1}{2}$
Walden A. - - -	Ben.	1136	1946 5 9
Coggeshale, or Coxhall A. (m) - - - }	Cist.	1142	251 2 0

GLOUCESTERSHIRE. (n)

Gloucester St. Peter's A.	Ben.	ab. 680	1946 5 9
Theokesbury, or Tewkes- bury A. - - - }	Ben.	715	1598 1 3
Winchelcombe A. - -	Ben.	798	759 11 9 $\frac{1}{2}$

(i) Not in Wiltshire, as Matth. Westm. lib. ii. p. 145. and Leland. Collect. i. 455.

(4) For Tinnmouth, generally placed here, see NORTHUMBERLAND.

(1) This is *Dugdale's* valuation: in Lib. Reg. Durham priory, with Finchale, Yarrow, Wearmouth, Infula Sacra, Farn-Island, Lethorn, Stamford, and Durham college, are rated in one sum at 1804l. 10s. 3d. ob.; the amount of the several valuations in *Dugdale* is only 1689l. 15s. 11d. ob.(m) Omitted in *Degge*, *Watson*, *Gibson*, and *Burn*.

(n) Brihol, St. Austlin's, and Kingwood, are often placed in this county. See the former at the end of SOMERSETSHIRE, and the latter in WILTSHIRE.

GLOUCESTERSHIRE

OF MONASTERIES.

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GLOUCESTERSHIRE continued.

Monasteries.	Order.	Founded.	Value.
Cirencester A. - -	C. Aust.	1117	£. s. d. 1051 7 1½
Lantony near Gloucester, or Lantonia Secunda } -	C. Aust.	1136	648 19 11½
Hayles, or Tray A. -	Cist.	1246	357 7 8½

HAMPSHIRE.

Winchester St. Swithin's P.	Ben.	ab. 646.	1517 7 2½
Hyde, or Newminster A.	Ben.	901	865 18 0½
Rumsey A. - -	Ben. N.	967	393 10 10½
Wherwell A. - -	Ben. N.	986	339 7 7
Twinham, or Christchurch P.	C. Aust.	ab. 1150	312 7 0½
Southwyke, or Portchester P.	C. Aust.	1133	257 4 4½
Beaulieu A. - -	Cist.	1204	326 13 2½
Tychfield A. - -	Præm.	1231	249 16 3

HEREFORDSHIRE.

Wigmore A. (o) - -	C. Aust.	T. H. I.	267 2 10½
Leominster, or Lemster, olim Leonis Monasterium, Leof, or Llanlincsis, Cell. (p) - -	Ben.	bef. 1125	212 12 0

HERTFORDSHIRE.

St. Alban's A. - -	Ben.	793	2102 7 1½
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HUNTINGDONSHIRE.

St. Neot's, olim Eynulfesbury, or Henulvesberi P. - -	Ben.	T. H. I.	241 11 4½
Ramsey A. - -	Ben.	969	1715 12 3

(o) Expressly said in the act of surrender to be in this county, Rymer, xiv. 614: But Mr. Speed places it in Shropshire, upon the borders of which it is, and in the archdeaconry of Salop. It is thought to be in the parish of Leintwardine. N. This abbey is most certainly in Herefordshire, and in the parish of Wigmore, (not of Leintwardine), in the deanery of Leominster, and archdeaconry of Hereford. G.

(p) This was a cell only to Reading, to which it paid yearly 448l. 4s. 8d.; and hath no valuation in *Dugdale*, *Speed*, or the *Liber Regis*. It appears however from bishop Far's register, that the gross amount of its revenues was 660l. 16s. 8d. and the reprises only 448l. 4s. 8d.

KENT.

A CATALOGUE

KENT.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Canterbury church P. (g) Christ-	Ben.	ab. 600	2349	8	5
Canterbury St. Augustine's A.					
Leedes P.	C. Auf.	1119	362	7	7
Boxley A.	Cist.	1146	204	4	11
Feverham A.	Ben.	1147	286	12	6½
Dertford P.	Auf. N.	ab. 1355	380	9	0½
Rocheſter P.	Ben.	ab. 600	486	11	5
Malling A.	Ben. N. T. W. Rufus		218	4	2½

LANCASHIRE.

Furnes A. (r)	Cist.	1124	805	16	5
Whalley A.	Cist.	1172	321	9	1½

LEICESTERSHIRE.

Leiceſter St. Mary A.	C. Auf.	1143	951	14	5½
Landa, Launde, or Loddinton P.	C. Auf.	T. H. I.	399	3	3½
Croxton, or De Valle in Croxton A.					
	Præm.	1162	385	0	10½

LINCOLNSHIRE.

Bardney, olim Beardanam A.	Ben.	T. Ethelred	366	6	1
Crowland A.	Ben.	716	1083	15	10½
Spalding A.	Ben.	1052	767	7	11
Sempringham P.	Gilb.	ab. 1139	317	4	1
Kirkſted A.	Cist.	1139	286	2	7½
Thorneton upon the Hamber, or Thornton Curteis, olim Torington A.	C. Auf.	1139	594	17	5½
Revesby A.					
Lincoln St. Catherine P.	Gilb.	1148	202	5	0½
Barlings, (s) or Oxeney A.	Præm.	1154	252	5	11½

(g) Omitted in *Degge, Watſon, Gilſon, and Burn.*

(r) This is often placed in Yorkſhire or Richmondſhire.

(s) Omitted in *Degge, Watſon, Gilſon, and Burn.*

OF MONASTERIES.

93

LINCOLNSHIRE continued.

Monasteries.	Order.	Founded.	Value.
			£. s. d.
The Priory in the Wood, or the House of the Visitation of the Blef- sed Virgin, near Epp- worth, in the Isle of Axholm - - - }	Carth.	ab. 19 R. II.	237 15 2½

LONDON and MIDDLESEX.

St. John of Jerusalem, or St. Jones - - - }	—	1100	2385 19 11
St. Bartholomew's P. (r)	C. Aufl.	1123	693 0 10½
Clerkenwell, or St. Mary de Fonte Clericorum P. }	Ben. N.	ab. 1100	262 19 0
Haliwell P. - - -	Ben. N.	before 1127	300 19 5
St. Helen's P. - - -	Ben. N.	ab. 1210	320 15 8½
Chartreuse House P. (u) -	—	ab. 1360	642 0 4½
The Minories (u) - - -	—	1293	318 8 5
Eaßminster New Abbey, or St. Mary of Graces, (w) - - - }	Cist.	1349-50	547 0 6½
Westminster, olim Thor- neie A. - - - }	Ben.	ab. 610	3470 0 2½
Syon A. - - - -	Brig. N.	1414	1731 8 9½

NORFOLK.

St. Bennet's of Hulme A.	Ben.	ab. 1800	583 17 0½
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(r) The valuations in the Lib. Regis of the different houses in London vary so much from those in *Dugdale* and *Stevens*, that they appear to have been taken from different surveys.

(u) These two are twice put down in *Degge*, *Watson*, *Gibson*, and *Burn*. The first by the names of "London, a house of Carthusians founded in the time of K. Edward 3," with *Dugdale's* valuation; and "St. Mary Charterhouse, Carthusians founded in the year 1379," with *Speed's* valuation. The latter, by the names of "London Minors, Benedicines, founded in the time of K. Edward 1," with *Dugdale's* valuation; and "St. Clare without Aldgate, Moniales, founded in the year 1292," with *Speed's* valuation.

(w) This abbey, S. Maria de Gratiis, was different from the abbey de Gratiis B. Marie, though they were both "extra muros civitatis London," and near the Tower.

NORFOLK

A CATALOGUE

NORFOLK continued.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Walsingham P. - -	C. Aust.	T. W. Conq. (x)	391	11	7½
Thetford P. - -	Clun.	ab. 1104	312	4	4
Castleacre, or Estacre P. -	Clun.	ab. 1085	306	11	4½
Norwich P. (y) - -	Ben.	1100	874	14	6½
Westacre, olim Acra P. -	C. Aust.	T. W. Rufus	260	13	7½
Wymondham, or Wind- ham A. - - - }	Ben.	before 1107	211	16	6½
West Dereham A. -	Præm.	1188	228	0	0½

NORTHAMPTONSHIRE.

Peterborough, olim Mc- deshamsted A. - }	Ben.	ab. 655	1721	14	0½
Northampton St. Andrew's	Clun.	1076	263	7	1½
Pipewell, olim S. Mariæ de Divisis - }	Cist.	1143	286	11	8½
Sulby, or Welleford A. -	Præm.	ab. 1155	(z) 285	8	5

NORTHUMBERLAND.

Tinmouth, (a) olim Dunc- muth, or Dounemad Cell. - - - }	Ben.	T. St. Oswald	397	10	5½
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NOTTINGHAMSHIRE.

Wirkelop, or Radford (b) P. - - - }	C. Aust.	T. H. I.	239	15	5
Lenton P. - - -	Clun.	T. H. I.	387	10	10½
Thurgarton P. - -	C. Aust.	ab. 1130	359	9	4½
Welbeck A. - - -	Præm.	1152	249	6	3

(x) This is *Dugdale's* valuation, besides which the offerings at our Lady's shrine were valued at 260l. 12s. 4d. ob. which two sums together make 652l. 3s. 11d. ob. q. the valuation in *Liber Regis*.

(y) Omitted in *Degge*, *Watson*, *Gibson*, and *Burn*.

(z) 258l. 8s. 5d. *Dugdale* and *Stevens*.

(a) Put in twice in *Degge*, *Watson*, *Gibson*, and *Burn*. In *Durham* with *Dugdale's* valuation, and here with *Speed's*.

(b) Called generally *Worklop Priory*, but it was situated at *Radford* near *Worklop*.

OXFORDSHIRE.

OF MONASTERIES.

95

OXFORDSHIRE.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Egnesham, or Eynsham A.	Ben.	before 1005	441	12	2½
Tame A. - - -	Cist.	ab. 1137	256	14	7½
Godeflow A. - - -	Ben. N.	1138	258	10	6½
Ofeney A. - - -	C. Aust.	1129	654	10	2½
Dorchester, (c) olim Dor-	C. Aust.	1140	217	5	9½
cia A. - - - }					

SHROPSHIRE.

Wenlock, olim Wimni-	Clun.	14 W. Conq.	401	7	0½
cas A. (d) - - - }					
Shrewsbury A. - - -	Ben.	1083	532	4	10
Haghamon A. - - -	C. Aust.	1110	259	13	7½
Lillehall, near Duninton, A.	C. Aust.	ab. 1145	229	3	1½
Hales, or Halesfoweyne }	Præm.	T. John	280	13	2½
A. (e) - - - }					

SOMERSETSHIRE.

Glaflonbury, olim Aval-	Ben.	—	(f) 3311	7	4½
lonia A. - - - }					
Bath A. - - -	Ben.	ab. 775	617	2	3

SOMERSETSHIRE

(c) Dr. *Nasmith* has omitted this house in his collection; the clear sum, according to *Stevens* and Dr. *Tanner's* MSS. valuation, being only 190l. 2s. 6d. q. However, if we may depend on the accuracy of the *Liber Regis*, this was one of the greater monasteries. Besides these five houses, *Degge*, *Watson*, *Gibson*, and *Burn*, have St. Frideswide's, Oxon, which was dissolved A. D. 1524.

(d) Capgrave in vita S. Millburgæ, and Leland. Collect. vol. ii. p. 170. In aftertimes the legal style of this monastery was Wenlock Magna, or Moche Wenlock, as Plowd. 127, 188.

(e) Placed also in Worcester-shire by Mr. *Speed*; and valued by *Dugdale* and *Speed*, and is almost all the catalogues of the greater abbeys, under both counties; and indeed it is in a part of Shropshire which is encompassed with Worcester-shire.

(f) After the attainder of the last abbot, a new survey was made of the possessions of this abbey, (printed by Mr. *Hearn* at the end of Langtoft's Chronicle, p. 343), in which they are valued at the clear yearly sum of 4084l. 6s. 8d. q. Nor does this latter survey seem to have been correct and full; for among the Harleian MSS. No. 142. in the British Museum, there is a book with this title, "An abstract or brief noat taken out of Mr. Nicolas Raie's Courte-Bookes and Courte-Rolles, the last of November, in the 24 yere of the raigne of our sovereigne ladye the quene's majesty that now is, of all such man-

"nots,

A CATALOGUE

SOMERSETSHIRE continued.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Athelney, olim Ethel- graia A. (g) - - }	Ben.	ab. 888	209	0	3½
Michelney, or Muchenay A. (b) - - - }	Ben.	939	447	4	11½
Bruton, Brewetone, or Briwedon A. - - }	C. Aufst.	ab. 1005	439	6	8
Montacute P. - - -	Clun.	{ T.W.Co. or H. I. }	456	14	3½
Taunton P. - - -	C. Aufst.	T. H. I.	286	8	10
Keynsham A. - - -	C. Aufst.	ab. 1170	419	10	4½
Minchin Buckland P. -	Aufst. N.	T. H. II.	223	7	4½
Witham P. - - -	Carth.	T. H. II.	215	15	0
Henton P. Atrium Dei, } or Locus Dei (i) - }	Carth.	1227	248	19	2

BRISTOL.

Great St. Augustine's P. -	C. Aufst.	1148	670	13	11½
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STAFFORDSHIRE.

Burton A. - - -	Ben.	1004	267	14	3
Dieulacres A. (k) - -	Cilt.	1214	227	5	0

"nors, lordeshippes, landes, tenements, parsonages, quit-rents, pencyons, and suche others
 "as was lefte out of auditor Peps booke of survey, at suche time and when as he made
 "and toke the survey of the late dissolved abbey and monastery of Glaston, and as are
 "to be had and come by for this thorte tyme of warning. Anno Domini 1581"

i. e. "An account of lands belonging to Glastonbury Abbey, and concealed from the crown; which so hapned, because these lands lay in the manors belonging to the lord abbat, but yet were separately held by divers officers of the abbey, who held their own courts upon them, and received the profits accruing from them."

(g) i. e. Clitonum Insula, Jo. Wallingford. Nobilium Insula, Leland. Collect. vol. iii. p. 44.

(k) Erroneously placed in Dorsetshire by the editors of the Monasticon.

(i) Henton is not in Wiltshire, as it is erroneously said to be in the Monasticon. And note, Athelney and Montacute are omitted in *Degge, Watson, Gibson, and Burn*.

(d) In *Degge, Watson, Gibson, and Burn*, Croxden, a Cistercian abbey, is added, which had only 90 l. 5 s. 11 d. per ann. clear. But the lands of it have been adjudged to be tithe-free, because it was continued by K. Henry 8.

SUFFOLK.

OF MONASTERIES;

97

SUFFOLK.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Bury St. Edmund, olim } Bederlesworthe, or Ead- mundestow A. - }	Ben.	1020	1656	7	3
Sibton A. (l) - -	Cist.	1149	250	15	7½
Butley P. (m) - -	C. Aust.	1171	318	17	2½

SURREY.

Chertsey, olim Cirotelege, } or Ceortesei A. - }	Ben.	666	659	15	8½
Bermondsey A. - -	Clun.	1082	474	14	4½
St. Mary Overy P. - -	C. Aust.	1106	624	6	6
Merton P. - - -	C. Aust.	1117	957	19	5½
Aldebury P. - - -	C. Aust.	T. R. I.	258	11	11½
Shene P. - - -	Carthuf.	1414	777	12	0½

SUSSEX.

Battell, or De Bello A. -	Ben.	1067	880	14	7½
Lewes P. - - -	Clun.	1078	920	4	6½
Robert's Bridge, or De } Ponte Roberti A. (n) }	Cist.	1176	248	10	6

WARWICKSHIRE.

Coventry P. (o) - -	Ben.	ab. 1043	538	4	0
Kenilworth, olim Che- } ningenurda A. - }	C. Aust.	ab. 1122	(p)538	19	4
Mereval, or De Miravalle, } near Atherston A. - }	Cist.	ab. 1148	254	1	8

(l) Not in Norfolk, as Mon Angl. vol. i. p. 886. and vol. iii. p. i. 32. This abbey, and all the estates belonging to it, were sold by the abbot and convent two years before the act for dissolving the greater monasteries.

(m) Ixworth is added in *Degge, Watfon, Gibson, and Burn*, with *Speed's* mistaken valuation of 280l. 9s. 5d. whereas the whole sum was really no more than 204l. 9s. 5d. and the clear sum only 168l. 19s. 7d. ob. q.

(n) These three in Sussex are omitted in *fir Simon Degge's* catalogue.

(o) Omitted in *Degge, Watfon, Gibson, and Burn*.

(p) Summa inde 219 l. 12 s. 0 d. ob. q. summa clara 190 l. 2 s. 6 d. q. *Stevens* and *Tanner's* MSS. valor. If we may depend on the accuracy of the Liber Regis, this was one of the greater monasteries.

A CATALOGUE

WARWICKSHIRE continued.

Monasteries.	Order.	Founded.	£.
Combe, (q) olim Smite, } near Brinklow A. - }	Cist.	1150	311
Nun Eaton P. (r) -	Fonterv. N.	T. H. II.	25

WILTSHIRE.

Ambrosebury, or Amef- bury, olim Ambrosia, five Ambrii Cœnobium A. - - - }	Ben. N.	ab. 980	49
Malmesbury, olim Caer Bladon, Ingelborn, Maidulphi urbs, five Curia, Aldhelmesbirig, Maldmesburgh, Mel- dunum, or Meldunef- burgh A. - - }	Ben.	ab. 670	80
Wilton, olim Ellandune A.	Ben. N.	T. Egbert	60
Kingswood A. (s) -	Cist.	1139	24
Bradenstoke P. -	C. Auf.	1142	21
Edindon, or Hedington P. (t) - - - }	Bonhommes	1358	44

WORCESTERSHIRE.

Worcester P. (u) - -	Ben.	T. Edgar	122
Perthore, olim Perfcora A.	Ben.	984	64

(q) Erroneously placed by Mr. Speed in Leicestershire.

(r) It is frequently called an *abbey* in the charters of Robert Boffu earl of founder, his son, and of K. Henry 2. Mon. Angl. tom. i. p. 518, 519.

(s) This abbey was placed in Gloucestershire in the first edition of *T. Monastica*, (as Mon. Angl. tom. i. p. 811. 1040. 1060.); but the town subject to the sheriff and justices of Wiltshire, and accounted within th Chipenham in that county, though it be encompassed with Gloucestershi miles distant from any other town in Wiltshire. With regard to the spiritu it is in all matters subject to the bishop and archdeacon of Gloucester.

(t) Farleigh and Lacock are added, with Speed's valuation, in *Degge, H and Burn*; whereas in *Dugdale* Farleigh is only 153l. 14s. 2d. ob. and 9s. 2d.

(u) Omitted in *Degge, Watfon, Gibson, and Burn*.

WORCEST

OF MONASTERIES.

99

WORCESTERSHIRE continued.

Monasteries.	Order.	Founded.	Value.		
			<i>£.</i>	<i>s.</i>	<i>d.</i>
or Evesham A.	Ben.	701	1183	12	9
Major P. - -	Ben.	ab. 1083	308	1	4½
.. (w) - -	Cist.	1138	388	9	10½

YORKSHIRE.

olim Streane- Sinus Phari, A. - -	}	Ben.	T. W. Conqr.	437	2	9
1 Salebeia A. -		Ben.	T. W. Conqr.	729	12	10½
lim Vetadun P.	Gilb.	ab. 1150		360	18	10
Mary A. -	Ben.	1088		1650	7	0½
olim Kyrkeby, enbrigge P. -	}	Clun.	T. W. Rufus	327	14	8½
istlai, or Nestel- - - -		C. Aust.	T. W. Rufus	492	18	2
Craven P. -	C. Aust.	1120		212	3	4
2. - -	C. Aust.	1121		269	5	9
3, or Bridling- 1 Brellinton, or na P. - -	}	C. Aust.	T. H. I.	547	16	11½
or Gyfburgh P.		C. Aust.		628	3	4
m Rievall, or A. - -	}	Cist.		273	10	2
or De Fonti- - - -		Cist.		998	6	8½
lim De Bella- 3egelandu, five d A. - -	}	Cist.		238	9	4
, or De Novo - - -		C. Aust.		367	13	3
De Rupe A. -	Cist.	1147		224	2	5
1. - -	Cist.	1147		329	2	11
Meaux A. -	Cist.	1150		299	6	4½
irvaux, or Ger- - - -	}	Cist.		234	18	5

7 placed by Speed in Buckinghamshire.

YORKSHIRE continued.

Monasteries.	Order.	Founded.	Value.		
Monk Breton, or Lunda P.	Clun.	T. H. II.	£. 239	s. 3	d. 6
Mountgrace P. (x) - -	Carthuf.	1396	323	2	10½

It may not be amiss to subjoin to this catalogue of the religious houses, part of the instructions which were drawn up by the king's order, to ascertain the value of all the estates of the clergy, both secular and regular, for the purpose merely, as it was alleged, of securing the full payment of the tenths. But as *Collier* observes, (*Ecccl. Hist.* vol. ii. p. 95), "these instructions had in all likelihood a farther reach: the design seems to have been to draw envy upon the spirituality from the greatness of the revenues. It was to give the king an inviting prospect upon the abbies, to awaken his fancy towards a dissolution, and solicit him to make prize of the church."

Biblioth.
Cott. Clcop.
E. 4. fol.
167.
These in-
structions
issued in
January
1534-5.

"Instructions devised by the king's highness, by the advice of his council, for knowledge to be had of the whole, true, and just yearly values of all the possessions, manors, lands, tene-ments, hereditaments, and profits, as well spiritual as temporal, appertaining to any manner of dignity, monastery, priory, church collegiate, church conventual, parsonage, vicarage, chan-cery, free chapel, or other dignity, office or promotion spiritual within this realm, *Wales, Calais, Berwick, and Marches* of the same, as well in places exempt as not exempt, which his pleasure is that such as shall have charge by his commission to survey the same, shall effectually, with all uprightness and dexterity, follow and ensue, as they will answer to his majesty at their peril."

(x) *Degge, Watson, Gibson, and Burn*, have also *Hull Chartreusehouse, Warton, and Old Malton*; whereas in *Dugdale* the first is valued at 174l. 18s. 3d. the second at 143l. 7s. 8d. and the third at 197l. 19s. 2d. They have also *Rithal* 351l. 14s. 6d. which is the total valuation of *Rivaulx*, before inserted with *Dugdale's* valuation. *Val Crucis* in *Denbighshire* is likewise put in with *Speed's* valuation, though valued in *Dugdale* at 188l. 8s. only. And *Stratflour* or *Strata Florida*, in *Cardiganshire*, (probably from the figures not being distinctly placed in *Speed*), is made 1226l. 6s. per ann. in *Degge, Watson, Gibson, and Burn*; whereas the sum total is no more than 122l. 6s. 8d. and the clear sum only 118l. 7s. 3d.

The

The Contents of the Instructions may be understood from the last Article, which was thus :

“ *Item*, Finally, after the true and just yearly value of all the dignities, benefices, offices, cures, and other promotions spiritual, afore rehears’d, examin’d, and known, then the said commissioners, to whom the commission shall be directed, shall cause to be made a fair book after the auditor’s fashion, putting first in the head thereof, the name of the archbishoprick or bishoprick where the commission is directed, if the see be within the limits of their commission ; and the whole and entire value thereof like as is aforementioned in the article concerning the same ; with the deductions to be resolute that are mentioned in the said article, and none other. And then next to put the name of the cathedral church or monastery, where the see of the archbishoprick or bishoprick is, and the number and names of all such dignities, prebends, offices, cures, chanteries, and promotions spiritual, which be in succession in the said cathedral church or monastery : and as well the whole and entire yearly value of the said cathedral church or monastery, as the particular yearly profit that belongs to every the said dignities, prebends, offices, &c. with the deductions to be resolute out of the same, as is mentioned in the article above specified concerning the same : and then next after that, to put the number and name of every archdeaconry and deanry rural, within the limits of their commission, and in whose diocese and jurisdiction they be ; and their severall and particular yearly value and deductions, like as is mentioned in the article concerning the same : and next after that to put every college, church collegiate, hospital, abbey, monastery, priory, house religious, parsonage, vicarage, chantery, free chapel, and all other promotions spiritual, under the title and name of the Deanry Rural, where such colleges, churches collegiate, hospitals, abbey, &c. lyen and bin founded ; and their severall and distinct yearly values, And the number and names of such prebends, dignities, offices, cures, chanteries, free chapels, &c. and their distinct and severall yearly values, as is before declared in the said articles : so that always under the title of every deanry rural, there be contain’d all such dignities, abbeys, monasteries, &c. wheresoever they lyen and byn in the deanry where they be founded and edified. And if any of them be out of the limits of all deanries, then to put ’em by themselves,

" rehearing their names, and the places where they lyen, and in
 " whose diocess and jurisdiction, with their whole values, &c.
 " added to every of 'em distinct by themselves: foreseeing always,
 " that in the making of the yearly values of every manner digni-
 " ties, monasteries, &c. above-mentioned, there be made a whole
 " and entire value of every of 'em by themselves, and nothing to
 " be allow'd or deducted out thereof for reparations, fees, serving
 " of cures, or any other causes or things whatsoever it be, except
 " only such annual and perpetual rents, possessions, alms, synods,
 " proxies, and fees for offices, as be before especially mentioned in
 " the articles aforewritten. And after the said book be made,
 " then the said commissioners shall certify the same unto the king's
 " exchequer, under their seals, according to the tenor of their
 " commission, as they will answer unto the king's highness at their
 " utmost peril; to the intent that the tenth of the premises may
 " be tax'd, and set to be levied to the king's use, according to the
 " statute made and provided of the grant thereof."

The Commission relating to the City and Liberties of *London*,
 made out in pursuance of the preceding Instructions.

Biblioth.
 Cotton.
 Clop. E. 4.
 fol. 167.
 A. D.
 1534-5.

" HENRICUS octavus Dei gratiâ *Angliæ et Franciæ* rex, fidei
 " defensor, dominus *Hiberniæ*, et in terrâ supremum caput *Angli-*
 " *cane* ecclesiæ, reverendo in Christo patri episcopo *Londinensi*, ac
 " dilectis et fidelibus suis *Johanni Champneys* militi, *Thomæ Crom-*
 " *well* magno secretario suo, *Johanni Alleyn* militi, *Thomæ Bedjil*
 " clerico, *Johanni Baker*, *Henrico White*, *Johanni Onley*, *Thomæ*
 " *Rushton*, *Gulielmo Bowyer*, *Paulo Wichpoll*, *Richardo Gresham*,
 " *Hervey Mildmay*, *Thomæ Burgoyne*, et *Thomæ Roberts*, auditoribus,
 " salutem: Sciatis quod nos de fidelitatibus et providis circum-
 " spectionibus vestris plenè confidentes; assignavimus vos quinque
 " quatuor e vobis, ac quinque quatuor et tribus vestrum, vel in ma-
 " jori aut minori numero, prout per discretionem vestram vobis
 " melius visum fuerit, plenam potestatem et auctoritatem ad inqui-
 " rendum, scrutandum, et examinandum viis, modis quibus scire
 " poteritis infra civitatem *London* et libertates ejusdem, de omni-
 " bus et singulis articulis et instructionibus præsentibus annexis,
 " faciend. et exequend. cum effectu, prout in iisdem articulis ple-
 " niùs continetur, et idem injungentes quod circa præmissa, effec-
 " tualitèr interdatis, ac ea faciatis et exequamini diligentes, &c.
 " quod veritatem de eisdem articulis, et de eorum singulis habere
 " poterimus,

" poterimus, absque favore, fraude, dolo, corruptione, inde nobis
 " respondere velitis ; et quicquid in præmissis thesaurario, cancel-
 " lario, camerario, et baronibus de scaccario nostro ; inde et de
 " omnibus circumstantiis eorundem prout articuli prædicti in se
 " exigunt ; et festo Sanctæ Trinitatis proximè futuræ sub sigillis
 " vestris distinctè et apertè in debitâ formâ inscriptis certificetis :
 " et hoc sub periculo incumbenti nullatenus omittatis. Damus
 " etiam præterea vobis plenam potestatem tales et tantos scribas,
 " registrarios, receptores, auditores, et alios officarios et ministros
 " quorumcunque prælatorum et clericorum ecclesiæ ; coram vobis
 " convocandi et examinandi, prout vobis pro meliori executione
 " videbitur expedire : mandantes in super tenore præsentium om-
 " nibus et singulis vice-comitibus, majoribus, ballivis, registrariis,
 " ac aliis officiariis et ministris, tam nostri quam aliorum prælato-
 " rum seu clericorum, singulis fidelibus subditis nostris quibus-
 " cunque quod vobis in executione præmissorum de tempore in
 " tempus intendentes sint et auxiliantes, prout decet. In cujus rei
 " testimonium has literas nostras fieri fecimus patentes apud *Westm.*
 " xxx die *Januarii*, anno regni nostri vicesimo sexto."

C A S E S

RELATING TO

T I T H E S.

Plac. in Octab. S. Mich. An. 9 & 10 H. III.
A. D. 1224.

PHILIP *de Ardern* Clerk was attached to answer *John* the son of *Robert*, wherefore he draws him into plea in court christian for the lay-fee of the said *John*, the son of *Robert*, contrary to the prohibition, &c. Whereupon the said *John*, by his attorney, complains, that the said *Philip* draws him into plea concerning the wood of *Lee*, and the moor of *Wytton*; and in like manner for this, that whereas the said *John* and his men take pledges of the said *Philip*, for injuring his corn and meadows, and other wrongs; the said *Philip* draws him into plea for that taking, whereby he is injured, &c. to the value of one hundred marks, and therefore he brings suit, &c.

*Prynne's
K. John,
p. 69.*

And *Philip* comes and saith, That he ought not to answer the said *John* or his attorney in any plea, because he is excommunicated; and he brings here the letters of the archbishop of *Yorke* thereof, which testify this *in hæc verba*. “ *W.* by the grace of God, &c. Know ye, that the abbot of *Kokersand*, and the priors of *Kokersand* and of *Rokeham*, have informed us, that they have, by the authority of the pope, put in the bond of excommunication the noble man *John*, the son of *Robert*; commanding us that we should denounce him such, which we signify to you at the instance of master *Philip*, the bearer of these presents, that
“ you

1224.

" you may be certified hereof. Farewell. Given, &c." And thereupon the said *Philip* saith, that he will not answer, unless the court shall advise it.

And *John* comes by his attorney, and saith, That he doth not complain of the plea before those judges, because, with respect to the tithes of hay and mills which *Philip* there demanded, he will willingly do what of right he ought to do ; but *Philip* empleaded him against the prohibition, &c. before *W.* treasurer and *G.* penitentiary, of *York*, concerning his lay-fee aforesaid, and moreover concerning a certain hermitage, and the tenth beast of his forest ; and therefore he hath suit ; and he freely grants to him, &c. the tithes of hay, and mills, and pannage.

And *Philip* defends the whole, except only so far as concerns the tenth beast which he demands, and whereof his church was seised, and saith, that he and his men have always had their pasture every where in the forest ; and the said *John* and his men take his men, and deprive him of his pasture and common.

Because the said *John* doth not shew at the said day, by citations or any other means, that the said *Philip* prosecuted any plea in court christian, concerning any lay-fee, it is considered that *Philip* go thereof quit, and *John* be in mercy. And it is prohibited to *Philip* to prosecute any plea against the crown of the lord the king.

In a fragment of plea-rolls in the Tower, before the justices itinerant, about the 55th year of *Henry* the 3d. (as Mr. *Prynne* conjectures by the hand), and A. D. 1274.

Linc. Rot.
10.
Prynne's
K. John,
p. 126.

Master *William de Brauncewell* was attached at the suit of *Gilbert Parleben*, wherefore he drew him into plea in the spiritual court about the chattels of the said *Gilbert*, which concern neither testament nor matrimony. And *Henry Dean* of *la Ford* was attached to answer the said *Gilbert*, wherefore he held the said plea.

And *William* and the *Dean* come and say, that after the prohibition of the lord the king, they never held nor prosecuted the said plea ; but they will speak the truth, that in fact, the said *Gilbert* sold to the said *William*, and to a certain person his partner, the tithes of the corn of his church for 37 marks ; and because he
had

had not paid that money at the appointed times, he, as parson, em-
pleaded him in the chapter before the prohibition : and he demands
judgement if he could do that or not ?

1274.

And *Gilbert* comes and acknowledges the whole, but saith, that
he paid the said money to him, but he hath no suit thereof : and
he saith, that the said *William* demands of him a certain pe-
nalty.

And *William* saith, that he neither doth nor will demand of him
any penalty.

It is therefore considered, that the said *William* may lawfully
prosecute the said plea in the spiritual court, since it is concerning
tithes, and that the said *Dean* may hold plea thereof. And *Gilbert*
in mercy.

Plac. Parl. 18 E. I. N° 34. A.D. 1290.

RALPH bishop of *Carlisle* demands against the prior of the
church of *Carlisle*, the tithes of two pieces * of land lately
assarted in the forest of *Ingelwood*, one of which is called *Lynthwayt*,
and the other *Kirkethwayt*, and which belong to the said bishop,
for that the said pieces are within the limits of his parish church of
Aspateryk, and for that the said bishop and his predecessors always
before the said pieces were prepared for cultivation, and whilst
they were covered with wood, have used to receive the tithes of
the pannage of the same pieces, until the said prior by a certain
suggestion made upon a suppression of the truth this year, sued
out a certain writ of the lord the king to the justice of the lord the
king of his forest beyond *Trent*, and unjustly deprived the said
bishop of the tithes aforesaid ; and that the tithes aforesaid belong to
the said bishop by reason of his church of *Aspateryk* aforesaid, he
prays may be inquired by the country.

Between
the bishop
and prior of
Carlisle for
the tithes
of assarted
lands.
See also
Riley's
Plac. Parl.
49.

Frynne's
K. John,
p. 409.

* *placcarum*.

And the prior comes and saith, that the tithes aforesaid belong to
him and his church of the *Blessed Mary* of *Carlisle*, and not to the
said bishop ; for he saith, that the lord *Henry*, the old king, granted
to God and his church of the *Blessed Mary* of *Carlisle*, and the
canons serving God therein, all the tithes of all lands which the
said lord the king, or his heirs, kings of *England*, should prepare
for cultivation in the aforesaid forest, and enfeoffed the said church
thereof by a certain ivory horn, which he gave to the said church,
and which it still hath ; and he prays judgement, &c.

And

1290.

And hereupon master *Henry de Burton*, parson of the church of *Thoresby*, comes, and saith, that the tithes aforesaid belong to him by reason of his church, and not to the said bishop and prior; because he saith, that the pieces of land aforesaid, of which the tithes are demanded, are within the boundaries of his parish, and that he and his predecessors have always been in the actual perception of the great and small tithes of the aforesaid pieces, as of the right of his church of *Thoresby*, until the said prior, together with certain other persons, by means of the said writ, unjustly deprived him of the said tithes; and that he and his predecessors have always been in the actual perception of the said tithes, as well great as small, he prays may be enquired of by the country, &c.

And *William Inge*, who sues for the lord the king, saith, that the tithes aforesaid belong to the lord the king, and to no one else, because he saith, that the said pieces are within the bounds of the forest of the said lord the king of *Ingelwood*, and that the said lord the king may in his said forest build towns, erect churches, assart lands, and confer such churches with the tithes of those lands upon whomsoever he will at his pleasure, for that the said forest is not within the limits of any parish; and he prays that those tithes may remain to the lord the king, as of right they ought for the reason aforesaid.

And because the lord the king would be certified upon the premises, that to every one may be given that which is his, let *William de Vesey*, justice of his forest beyond *Trent*, *Thomas de Normanvill*, escheator of the said lord the king in those parts, and *Michael de Arkle*, be assigned to enquire the truth of the matter in the premises; and what inquisition they shall make thereupon let them make known to the lord the king in his next parliament after *Easter*; and let the parties aforesaid wait that term. Afterwards, at the said parliament after *Easter*, the said *William de Vesey* and *Thomas de Normanvill*, recorded before the said lord the king and his council, that they could not proceed to take the aforesaid inquisition at the day before given, by reason of a certain letter of the bishop of *Carlisle* delivered to them, inhibiting them from putting any to their oath at that time, which letter, sealed with the seal of the said bishop, the said *William* and *Thomas* produced before the said lord the king: therefore, by the command of the lord the king, let the aforesaid *William*, *Thomas*, *John de Lythegreynes*, and *Michael de Harcla*, be assigned to take the aforesaid inquisition, so that they certify the lord the king thereof at his parliament after the

the feast of *Saint Michael* next ensuing, &c. and that they adjourn the aforefaid parties to the fame day, &c.

1290.

Rot. Parl. 33 E. I. N° 3. A. D. 1304.

To the petition of the prior and convent of *Christ Church*, praying remedy hereupon, that whereas *Isabella de Fontibus*, late countess of *Albemarle*, granted to them by her deed, the tithe of all conies in the manor of *Thorle*, in the *Iſle of Wight*, *William Ruffell*, the now keeper of the king of the iſle aforefaid, does not permit them to take any tithe of this fort :

Christ Church.
See alſo
Ril. Pl.
Parl. 242.

It is answered,—Let a writ go out of chancery to the treaſurer and barons, that they inſpect the deed, and make inquiry of the ſeiſin, and further do what ſhall be juſt.

Rot. Parl. 8 E. II. N° 97. A. D. 1314 & 1315.

To our lord the king and his council, ſhew his tenants of his town of *Liſkerede* in *Cornwall*, that whereas king *Richard of Germany*, formerly earl of *Cornwall*, granted to them in ſec-farm, his town of *Lyſkerede* aforefaid, with the mills of the town, rendering therefore yearly 18l. 18d. and half a mark to the vicar of the ſaid town, and that to be in ſatisfaction of the tithes of the ſaid mills ; and that the ſaid tenants ſhould not be any more charged againſt their warranty, the ſaid king *Richard* gave 8s. of rent to the prior of *Launceſton*, parſon of the ſaid town of *Liſkeard*, at the great requeſt of the ſaid prior and vicar, who then covenanted that it was the eſtabliſhed payment for tithe for ever ; from which time till now the ſaid farmers have paid the half mark to the vicar, and the king's provost of his manor of *Liſkeard* has paid the 8s. to the parſons of the church ; but now lately *John Launſeles*, vicar of the ſaid town, notwithſtanding the compoſition made between the king *Richard* of *Germany* and the vicar's predeceſſors above named, came and demanded of them the tithes in kind, whereas by the aforefaid compoſition he ought to have only the demy mark, and the prior, the parſon, the 8s. to the diſheriſon of the king, and to the charge of the town aforefaid ; and upon this the biſhop of *Exeter* has excommunicated them, and interdicted their church, and condemned them, whereas they can neither charge nor diſcharge themſelves, nor prove the ſaid compoſition, nor put it in judgement without the king and his council ; wherefore they pray remedy.

Tenentes
Ville de
Lyſkeryde,
(Dorſet.)

Answer.

1314-5. *Answer.*—Let *Hugh de Curtney*, *John de Foxle*, and *John de Westle*, or two of them, so that the said *Hugh* be one, be assigned to enquire in the presence of the parties of the tithe within written, to wit, how much tithe hath used to be given for the mills, &c. at the time when it was in the hand of king *Richard of Germany*, and whether there be a composition thereof or not, and of the other articles, &c. and let them return the inquisition before the treasurer and barons of the exchequer, and let there be done thereupon there what justice shall advise; and let there be a writ to the bishop, commanding him, in the mean time, to supersede the execution to be done against the men of *Liskeard*, of those things which were drawn in plea before him concerning the said tithe, and in the mean time to revoke also the sentence, if any should have been denounced against them in that case.

Rot. Parl. N^o 131. *Eodem Anno.*

TO the petition of the prior of the church of Christ of *Twynham* suggesting, that whereas he had empleaded the prior of *Brunmore*, in court christian, for certain tithes arising in the lands of the said prior of *Brunmore*, in the parish of the church of the said prior of the church of Christ of *Bolfe*, yet by a certain prohibition of the king, directed to the judges, forbidding them to proceed in the said plea, for that the said prior of *Brunmore* held all his demesne lands in the new forest of the gift of king *Henry*, the king's grandfather, the said judges have not proceeded any farther in the plea, &c. wherefore they pray remedy:

Answer. It is answered, let *John de Foxle* and *John de Westcote* be assigned to inquire, in the presence of the parties, who are previously to be summoned, if they choose to be present, whether the said place of which the tithes are demanded be included in the king's charter made to the prior of *Brunmore*, and were of the demesne lands of the said prior at the time of making the said charter, or whether the said prior acquired that place afterwards, and if so, then of whom, and when; and if the said place be within the limits of the parish church of *Bolfe*, and were tithable before it came to the hands of the said prior, or not; and if so, then in what manner, and how; and let them return the inquisition into chancery.

Rot.

1314-5.

Rot. Parl. N^o 134. *Eodem Anno.*

To the petition of *Thomas de Yurflet*, parson of the church of *St. John of Devises*, suggesting, that he and all his predecessors have used to have the tithe of hay in the meadow of the park of *Devises*; which meadow is now converted into pasture, and sold to divers men of the country for the feeding of their beasts; and which tithe is now of late subtracted; wherefore he prays remedy:

It is answered, let *John de Fosse*, master *John Waleweyn*, and *William de Harden*, or two of them, be assigned to inquire whether the king, at the time when the park was in his hand, used to give the tithe of hay of the meadows in the said park, and from what time, and in what sort, and how; and if those meadows be changed into pasture, then when, and by whom, and in what sort, &c. and how much the tithe thereof coming is worth, &c. and let the inquisition be made in the presence of the parson, if, being warned, he choose to be present, and let the inquisition be returned before the king. Answer.

Rot. Parl. N^o 221. *Eodem Anno.*

To the petition of — abbess and the convent of *Godeflowe*, suggesting to the king, that they are of the foundation of the king's ancestors, and that at the foundation of their house the tithes of all things renewing in the manor and park of *Woodstock* were granted by the charters of the king's progenitors; by virtue of which grant the said abbess and convent, and their predecessors, have always hitherto been seised of the tithes following, to wit, of the tithes of all colts of the king's stud; and that the now keeper of the said stud refuses to pay such tithes, paying only one of the weaker colts to the said abbess and convent yearly; and fourteen colts of the two years last past, for which they have received nothing, remain to be accounted for; wherefore they pray a fit remedy:

It is answered by the council. It seems to the council, that if such sort of tithe be due, and the religious be in the actual perception of it, it must be commanded to the king's bailiff that he pay the tithes due annually; and also pay the arrears thereof, if any there be. Answer.

Rot.

1321-2.

Rot. Parl. 15 & 16 E. II. N° 10. A.D. 1321 & 1322.

Prior and
convent of
Brecknock.

* Des toutz
manieres
despenfes
faitz par les
seigneurs,
&c.—See
similar
grants of the
tithes of all
sorts of vic-
tuals, wine,
liquors, fish,
fowls, but-
ter, cheese,
&c. spent
in castles or
houses, in
Prynne's
K. John,
p. 104.

TO our lord the king and his council, his poor chaplains, the prior and convent of *Brecknock*, pray remedy, for that whereas the keepers of the lands and castles of *Brecknock*, *Hay*, *Glenlevny*, *Talgarth*, thereto appointed by our lord the king, detain from them certain tithes, of which they have been seised from the time of the foundation of their house until now, under divers deeds of the lords of those lands and castles, that is to say, of the tithes * of all manner of things consumed by the lords of the same lands and castles, or by their servants, whether the lord be present or absent, and the tithe of pleas, tolls, gifts, gains, rents, and of all manner of profits; by which detention your said chaplains are in great mischief of their livelihood: wherefore may it please you, for God's sake, to command your said keepers that they may have and receive the afore said tithes for their sustenance, as they hitherto have done, according to the purport of their charters; for if they are not supplied with the afore said tithes for their sustenance, they cannot remain there to do for the service of God, as they are bound.

Answer.—Be it commanded to the keepers of these parts, that they suffer the prior and convent to have and receive the tithes, &c. as they have always before this time had and received them; as they can by inquisition, or any other manner, reasonably know what they have had and received.

Pat. 1 E. III. P. 1. M. 5. A. D. 1327. *Rym.
Fædera*, Vol. IV. 277.

Of not observing a Prohibition.

THE king to all to whom, &c. health. The venerable father, *Gaucelin*, cardinal priest of the title of Saint *Mar'* and Saint *Peter*, hath prayed us by his petition exhibited before us and our council, that whereas divers persons in our realm are bound to him in divers sums of money for the tithes and fruits of his benefices in *England* purchased by them, and maliciously refuse to satisfy him or his proctors for the same; and the said persons, though they had voluntarily submitted themselves to the coercion of the ecclesiastical jurisdiction, and had consented that they might be compelled by ecclesiastical censures to the payment of those sums,

if they should fail therein at the appointed periods; nevertheless bring the king's prohibitions to the ecclesiastical judges, by reason of which the said judges dare not to compel them to make such payments, so that the said cardinal is defrauded of his debts; we would be graciously pleased to provide for his indemnity in this behalf: we, having consideration to the laudable obedience which the said cardinal paid to the lord *Edward*, late king of *England*, our father, and which he continues to pay daily to us and to our whole realm, and willing, of our special grace, to provide for his indemnity in this behalf, will and grant that the said cardinal and his afore said proctors may demand and sue in the ecclesiastical court for all debts which are owing to the said cardinal for the tithes and fruits of his benefices in *England*, and that the ecclesiastical judges may compel the said debtors by any censures of the church to make payment of the said debts, any prohibition from us notwithstanding.

In witness whereof, &c. to endure for two years.

Witness the king at *Westminster*, the twenty-sixth day of *March*.

By the king and council.

Pat. 2 E. III. P. 2 M. 34. A. D. 1328. *Rym.*
Fœdera, Vol. IV. 356.

The Revocation of the above Suspension of a Prohibition as made against the Common Law.

THE king to all to whom, &c. health. Although we have granted by our letters patent to the venerable father, *Gaucelin*, cardinal priest of the title of St. *Mar'* and St. *Peter*, that he and his proctors may demand and sue in the ecclesiastical court for all debts which were owing to the said cardinal for the tithes and fruits of his benefices in *England*; and that the ecclesiastical judges may compel the said debtors by any ecclesiastical censures to make payment of the said debts, any prohibition from us notwithstanding; yet because, at the prosecution of *Robert de Lasey*, suggesting, by his petition, in our parliament lately convened at *Northampton*, that he hath been empleaded in court christian by the proctors of the said cardinal for such kind of fruits sold to the said *Robert*, and that he, by reason of our said letters patent, could not have any aid in our court against the said proctors, according

1328.

to the law and custom of our realm; it seemed to the great men and nobility of the said realm there present, that the said grant was made against the common law of the same realm; we will, that if the said *Robert* be hereafter empleaded in court christian by the said cardinal, or his proctors, under pretence of the said grant, for such sort of debts as aforesaid, that the said *Robert* may henceforth have prohibitions and attachments thereupon in our chancery if he please, our aforesaid grant notwithstanding.

In witness whereof, &c.

Witness the king, at *Evesham*, the twenty-eighth day of *June*.

By petition of the council.

Pet. Parl. 2 E. III. N° 3. A. D. 1328.

Bishop of
Landaff.

TO our lord the king, and his council, prays his chaplain, the bishop of *Landaff*, that whereas he holds the church of *Newland* in the forest of *Deane* to his own use, and we have a mine of iron within the parish whereof we make profit, and whereof your father, sire, whom God have mercy upon, commanded by his writ that tithe shou'd be given to your petitioner's predecessor who lately died, the transcript of which writ is attached to this petition; nevertheless, sire, your bailiffs of those parts will not give the said tithe without a further command; wherefore the bishop prays, that having regard to this, that the tithe is due of right, and that it hath been yielded before this time, you wou'd command the said bailiffs, that the tithe may be given as it belongs to him.

Answer.—Let the rolls of chancery be searched; and if it be found that such writ was heretofore granted, let such writ be had now.

The writ.

The king to the keeper of the forest of *Deane*, health. The venerable father *I.* bishop of *Landaff*, hath prayed us by his petition lately exhibited before us, that whereas tithe ought to be given to God and holy church of every thing yearly renewing, and we yearly receive great profit from our mine of iron in our forest aforesaid within the parish of the church of the said bishop of *Newland*, which he holds to his own use, and are willing to yield a tithe to the same church for such kind of profit arising from our mine within the parish of the church aforesaid; we, though it fully appears to us by the certificate thereupon made to us at our command

command by our treasurer and barons of the exchequer, that no tithes have been heretofore given of such kind of profit, nor any recompence made in times past in lieu of such tithes; willing nevertheless to assent to the petition of the said bishop in this behalf, command you, of our special grace, that you cause the tithe of such sort of profit arising from our mine of iron within the parish of the church aforesaid, to be henceforth yielded to the same church; and we will make due allowance to you thereof in your account of the aforesaid profit. Witness ourself at *Westminster*, the 15th day of *November*, in the 14th year of our reign.

1328.

Per ipsum regem.

Pet. Parl. 4 E. III. N^o 80. A. D. 1330.

To our lord the king, and to his council, shew his chaplains, the prior and convent of Saint *Fredeswode* of *Oxford*, that whereas they are parsons of *Acle* and of *Brehalle*, within which parish a great part of the forest of *Bernwood* lies, in which forest Master *John Mautravers*, late keeper of our lord the king of his forests beyond *Trent*, made sale for the king's profit of underwood, whereof the said prior and convent, as parsons of the said place, ought by right of holy church to have the tithe; for which they have lately applied to the said Master *John*, for so much, while he was keeper, as they ought to have for their tithes, as the right of holy church requires; and he thereupon did nothing; wherefore they pray our said lord the king, for his grace, and that he will order that they be paid their tithes aforesaid:

Answer.—Let the keeper of the forest be commanded to cause the tithe to be paid to . . . as it hath been paid in the time of his progenitors.

Pet. Parl. 8 E. III. N^o 61. A. D. 1334.

To our lord the king, sheweth his clerk *Henry de Kendall*, parson of the church of *Rye*, which is the king's advowson, that none of the fishermen of his said parish yield any tithe of their fisheries to the said parson; wherefore he prays that he may have our said lord the king's permission to sue his action against them for the said tithe in court christian, without incurring the indignation or contempt of our said lord the king.

Answer.—Let him sue if he will.

1347.

Rot. Parl. 21 & 22 E. III. N° 5. A. D. 1347.

TO our lord the king, and his council, his poor chaplains the abbot and convent of *La Roche*, parsons of the church of *Haytfield*, pray, that whereas they ought to have yearly *one heifer in the park or woods of *Haytfield*; and also yearly sixteen great beasts in the park or woods aforesaid, in lieu of tithe of herbage; and likewise to have all their pigs within the said parish fed in the woods of *Haytfield* aforesaid, without paying any pannage for the same in lieu of the tithe of pannage; and also for the tithe of the fishery of *Braythemer* and *Newflet*, a *bind of eels yearly, to be taken as of the right of their church of *Haytfield*; whereof the said abbot and convent have been seised time immemorial, until the manor of *Haytfield* came into the hands of our lord the king, after the death of *John* late earl of *Warren*, and is now in the hands of madam the queen *Philippa*, who holds it of the grant of the king; wherefore may it please our said lord the king to ordain remedy in this case.

Answer.—Let proper persons be assigned in chancery, to inquire, in the presence of the queen's keeper there, of the matters contained in the petition; and the inquest being returned into chancery, let the chancellor call before him the said queen's counsel, and the king's serjeants, and any others whom he shall think proper to call; and having heard the reasons which the parties can allege, let him further do law and right.

Rot. Parl. N° 134. *Annis incertis*, E. III.

TO our lord the king, and his council, the abbess of *Godstow* prays, that whereas our lord the king's ancestors have, by their charters, granted to the abbess and house of *Godstow*, at the foundation of the church, the tithe of all the venison which shou'd at any time thereafter be taken in the forest of *Whittlewood*; by virtue of which grant, the predecessores of the now abbess was seised, until *Hugh Le Despenser*, the father, when he was keeper of the said forest, disturbed *Mabille Wafre*, the predecessores of the now abbess, in the receipt, of the said tithe; wherefore she prays remedy.

Answer.—Let her shew the charter in chancery, and thereupon let a writ issue to the justice of the forest, or to his lieutenant, &c. that he cause inquiry to be made whether the predecessores of the said

ſaid abbefs were ſeiſed of this tithe as the petition purports ; and which of her predeceſſoreſſes was firſt ouſted thereof, and by whom, and for what cauſe, and of all other neceſſary things ; and the inqueſt being returned into chancery, let it be ſhewn to the king.

1421.

Rot. Parl. 9 H. V. N^o 12. M. 5. A. D. 1421.

BE it remembered, that whereas maſter *Wantier Cook*, parſon of the church of *Somerſham*, in the dioceſe of *Lincoln*, commenced a ſuit in the court of arches of *London* for the recovery of certain tithes of a meadow or marſh, called *Cronland Mede*, ſituate within the bounds and limits of the ſaid church, or the tithable places thereof, as of right belonging to the ſame church, againſt one *William Whitbed*, and others, who were tenants of the abbot of *Rameſey*, regardant to his manor of *Chaterys*, and occupiers thereof, and who wou'd not pay nor yield any tithe thereof ; and although the ſaid abbot for this reaſon made himſelf a party againſt the ſaid maſter *Wantier* in the ſaid ſuit, alleging in his plea which he pleaded, that the ſaid meadow or marſh was parcel of his ſaid manor, ſituate within the ſaid pariſh of *Chaterys*, and in the dioceſe of *Ely*, and that he ought not to pay any tithe thereof, becauſe it was diſcharged of the payment of all manner of tithes by papal privilege, and by title of preſcription ; yet the ſaid parſon recovered againſt them his tithes ariſing from the ſaid meadow or marſh, by the ſentence given in the ſaid court of arches ; as by a libel delivered to my lord chancellor of *England*, under the ſeal of the dean of the ſame court of arches, and by the ſame chancellor ſhewn to this parliament, it more fully appears ; whereupon the above mentioned abbot lately came into the king's chancery, and prayed upon the matters contained in the ſaid libel, the king's writ of prohibition to iſſue out of the ſaid chancery, in order to ſtop the execution of the ſaid ſentence, ſurmizing, among other things, that the queſtion between the ſaid parties upon the matters aforeſaid in the ſaid court of arches was by the words of the ſaid libel concerning the bounds and limits of the ſaid meadow or marſh, and not merely concerning the tithes ; in which caſe the court chriſtian cou'd not have conſuſance. And forasmuch as great altercations and debates were for a long time had and moved in the ſaid chancery, between the counſel for both parties, upon the matters aforeſaid, and my ſaid lord chancellor, and the king's clerks of his chancery, cou'd not, by reaſon of the difficulty, be ſhortly and rightly adviſed to do

1421.

what the law wou'd in this behalf, my said lord chancellor adjourned the matter to this same parliament, and put off and referred the said parties there to hear what might be determined by the advice of the same parliament, according to the effect of the old statute of *Westminster* the second. And afterwards, upon the shewing of all the premises in this same parliament by my said lord chancellor, the said parties being then present, and being heard as to what, by the advice of their counsel, they pleased to say or declare thereupon, by the command of the honourable prince my lord *John* duke of *Bedford*, keeper of *England*, the king's justices as well of the one bench as of the other, and also the chief baron of the exchequer, then present before the said keeper and lords in the same parliament, were firmly charged, that having considered and understood the matters in the said libel contained, whereupon the said abbot made his said prayer, they should give their good advice according to the exigency of the law, for the more sure exhibition of justice in this behalf. Whereupon good and mature deliberation being had by the said justices and barons, and their several reasons afterwards delivered *seriatim* being heard and understood, it was the opinion of the said keeper and lords, according to the advice of the said justices and baron, that no prohibition lay upon the matter aforesaid so prayed against the execution of the said sentence, nor could it lie, nor was it grantable in the case.

M. 30 H. VIII. A.D. 1538.

[Dyer, 43 a.]

If the parson purchase a manor within his parish, the unity of possession discharges it

(a) IF the parson of a church purchase a manor within his parish, now by this purchase and unity of possession, the manor which was titheable before is made untitheable, because he cannot pay tithes to himself; but, if the parson make a lease of his parsonage of tithes; but when the possession is severed, they revive.

age

(a) *T. 4 Eliz. Rot. 619. in B. R. Wright* libelled in the spiritual court against *Champion* for tithes arising and coming out of the manor of *Newton Valence* in the county of *South Surrey*. *Champion* brought a prohibition, and the matter of law was, A man devises his rectory except his own tithes, and afterwards grants his land, shall the grantee be discharged? *Hobart* thought not, because they are in the grantor by way of detainer.—*T. 36 Eliz. Rot. 506. B. R.* In an action of debt by *Hungerford v. Hawland*, the condition was, that the defendant should suffer the plaintiff, &c. quietly to enjoy his manor of *D.* in the parish of *S.* (where the defendant was parson), and all his

age and rectory to a stranger, then the parson himself shall pay the tithes of his manor to the lessee of the rectory: and if the parson make a feoffment of the manor, the feoffees shall pay tithes to the parson so enfeoffing, because tithes cannot be extinguished by any unity of possession, as a rent-charge may which is issuing out of the land; but tithes are due by the law of God *ex debito* for the occupation and tillage of the occupier in whose hands soever the land come, if it be not the hands of the parson himself. And all this matter was agreed by the judges and serjeant; but they differed in opinions, Whether if the parson let parcel of his glebe for years or life, reserving rent, the lessee should pay tithes, or not? *Quære inde.*

E. 7 E. VI. A. D. 1553.

The Dean and Chapter of *Bristol* against *Clerke*.

The Serjeants' Case. [Dyer, 83 a.]

THE case of the new serjeants was, that assize was brought by the dean and chapter of *Bristol* against one *Clerke*, for a portion of tithes in *North Cerney*, in the county of *Gloucester*, in which divers exceptions were taken to the writ, and to the plaint which comprehended the title of the plaintiff, upon which was a demurrer in law. The first was, because the writ was of *freehold* where it should be of a *portion of tithes*. Also, that the writ ought to

Assize of a portion of tithes by a dean and chapter, and demurrer thereto; because, 1. The writ was de *libero tenemento*.

his other lands, tenements, and hereditaments there, in such and the like sort as the father of the plaintiff, &c. enjoyed, &c. without interruption, suit, or denial, &c. The defendant pleaded conditions performed; the plaintiff replied, that his father, for the space of, &c. before, was seised of the said manor of *D.* and of a portion of tithes, by reason whereof he held the land discharged, and now the defendant has libelled against him in the spiritual court, &c. Resolved, that the condition was broken; for, notwithstanding the unity of possession, the manor and the portion of tithes out of the manor continue several, and both descend to the plaintiff, so that at the time of making the obligation, and afterwards, the manor is discharged of tithes; wherefore judgment was entered for the plaintiff, especially because of the word *hereditament* in the condition — *M. 31 and 32 Eliz.* In prohibition between *Perkins* and *Hinde*, parson of *Babington*, [Cro. Eliz. 161. 11 Co. 13 b.] the case was, That the said parson, by deed indented, leased his glebe, with the profits and advantages thereto belonging, for ninety-five years, rendering five pounds for all exactions and demands whatsoever to the said rectory for the aforesaid close belonging; and the question was, Whether the lessee should have the said close discharged of tithes during the term? And resolved by the court, that the tithes shall not pass by such general words.

1553.

1. The tenant was not joined with the disseisor in the writ.
3. A plaint of "a certain portion," &c. is uncertain.
4. The statute 32 H. 8. c. 7. is not set out.
5. The writ was of tithes in *demesne* as of fee.
6. For that the title was pleaded double, *s.* that *I.* late prior, &c. was seised, &c. in right of his church; and that he and all his predecessors were seised, &c. from time, &c.
7. It is uncertain to what the words "*by virtue whereof*" in the title refer.
8. The king is not stated to be seised of the tithes in right of his crown.
9. The christian name of the dean is omitted.
10. For that the tithes in suit are not averred to be parcel of the *demesnes* of the archbishop of York, late in the tenure of *E. T.* as they were described in the king's grant of them.

have been brought as well against the tenant of the land as against the disseisor, as in assize of rent charge. But see statute 32 H. 8. c. 7. which answers this exception. Also, for that the plaint is uncertain, *s.* "*of a certain portion of tithes of sheaves of corn, hay, wool, and lambs, annually arising, renewing, and growing of and in two hundred acres of land, twenty acres of meadow, and one hundred acres of pasture, with the appurtenances, in North Cerney.*" Also, that the statute 32 H. 8. c. 7. which gives temporal actions for tithes and spiritual profits, ought of necessity to be recited in the plaint. Also, for that the form of pleading, which was, *s.* "*of a portion of tithes, &c. in his demesne as of fee,*" is not good; for tithes are not in *demesne* any more than an advowson. Also, that the title was double, because it is alleged that *one I. late prior of S. was seised, &c. in fee in right of his church,* and that *he and all his predecessors were seised, &c. from time immemorial*; and so the prescription carries a double face. Also, for that the words in the title, *s.* *by virtue whereof,* are uncertain to what thing they shall be referred. Also, it is alleged that king H. 8. was seised of the said portion by reason of the suppression of the said late priory, which was under three hundred marks in his *demesne as of fee,* without saying *in right of his crown,* and in fact by the act of suppression, in 27 H. 8. (which is not printed) [it is now c. 28.] the possessions of such little abbies and monasteries are annexed to the crown. Also in the conveyance of the said portion of tithes by the grant of king H. 8. to the said dean and chapter, the christian name of the said dean is omitted. Also it is alleged, that the said king H. 8. gave and granted the aforesaid portion of tithes *inter alia,* by the name of the entire portion of tithes arising, &c. out of the *demesne lands of the archbishop of York,* lying and being in North C. in the said county of G. called the late monastery, now appertaining, &c. and then, *or lately being, in the tenure of E. Tame, Knight, &c.* and there is no averment in fact, that the lands put in view of which, &c. were *demesne lands of the archbishop, and in the tenure of E. Tame.* And this was the most doubtful and material exception, by the judges. Also, the matter in law is, Whether the dean and chapter, being a body politic, of whom the statute makes no mention, only of a person or persons, be within the benefit of the statute? and also, Whether the tithes in their hands, being spiritual persons, can be demanded in the temporal courts, as lay or temporal things, or not? and, Whether the tithes, by the statute of 27 [H. 8.

c. 28.]

c. 28.] (which is the statute of this suppression) or by the 32 [H. 8. c. 7.] are made lay or temporal by any words in the said statutes?

(a) 1. As to the first exception, it seems that the writ is good; for when a man hath a special remedy at the common law provided for by writ in the register, which serves only for one case, and for one thing, and afterwards a like remedy is provided by the statute in another case, and for another thing than there was any help for at the common law, the general writ, ready framed, shall serve in the new case, and the special matter shall be shewn in the count, unless a special writ be expressly provided in the statute; as the writ of *cui in vitâ*, at common law, served only upon a discontinuance, in which the demise of the husband is supposed by the writ, and by the statute of *Weslm. 2. c. 3.* a *cui in vitâ* is given upon a recovery by defendant, and no form of writ there framed, wherefore the common writ supposing a demise, which is false in fact, shall serve, &c. So divers writs of *præcipe quod reddat* are now by statute against *cestuy que use*, and pernor of the profits, although he is not tenant of the land: the form of the writ at common law is not altered by that: so the statute of 4 H. 7. [c. 17.] gives a writ of right of ward for the heir and land of *cestuy que use* of land holden by knight-service; as if the ancestor had died seised in *demefne*, the writ of ward at the common law shall serve, which supposes that the ancestor held his land by knight-service, which is false, but the special matter shall be declared in the declaration. So the tenant by *elegit*, or statute, who hath only a term and chattel, shall have assize if he be ejected, by the statute, as of freehold, and the form of the writ is of freehold, and not of a term, &c. Then if a general writ shall serve in a new case where the writ in its supposal is false, *à fortiori*, the general writ of assize in this case, which is not false but true (for tithes are now at this day made lay and freehold by reason of the said statute), shall well serve. And although the said statute of 32 H. 8. that a man shall have original writs for tithes, as the case shall require, to be devised and granted in the king's court of chancery, yet if the chancellor think this general form of writ of assize of novel disseisin good, without devising a new form, that is well enough in this court; but we have a doctrine, that if a man have a writ

Answer to
1 Obj.
In an assize
for tithes,
the writ
shall be *de
libero tene-
mento*, and
the plaint
and title
therein shall
be special.

(a) Note, that assize of tithes did not lie at common law, 21 H. 7. 3. b. by *Elliot*.

framed

1553.

framed in the register for his special case besides the general writ, and he use the general writ for his special case, it shall abate, as in assize of common, the writ shall be of common of pasture, and there are no forms of writs of assize except those two, wherefore, &c. And see 7 H. 7. [2. a.] in trespass by the husband and wife of a clofe broken, and his goods taken, and count of a trespass done to the wife while single, that shall abate the writ, &c.

Answer to
2 Obj.
Assize lies
of tithes in
the hands of
the pignor
without
naming the
tenor-tenant.

As to the second exception, s. Whether the tenant of the land shall be named in this case, or not?—it seemed that he needs not, for the words of the statute 32 [H. 8. c. 7. § 7.] are, “*that if any one be disseised, deformed, wronged, or otherwise kept from their lawful inheritance, state, seisin, possession, &c. by any other person or persons claiming, or pretending to have interest or title in or to the same, that then the person so disseised, deformed, wronged, &c. shall have their remedy in the king’s temporal courts, &c. as the case shall require, for the recovery, getting, or obtaining, &c. by original writs of præcipe quod reddat, assize of novel disseisin, mort d’ancestor, &c. in like manner and form as they should or might do, for lands, tenements, or hereditaments, in such manner to be demanded;*” wherefore it is not necessary to name the tenant of the land, as in assize of rent charge or seck, which are things against common right, &c. And besides, for any thing that is yet shewn, the tenant in assize may be tenant of the land, &c. for he hath demurred in law to the title, and no plea is offered that there is no tenant of the land named in the assize, wherefore it seems that this point ought not to be argued in this case. It seems also that no man can be tenant or pignor of a tythe but he who takes it; and there is a difference between rent and tithe, for tithe is not issuant out of the land as rent is, nor to be paid by the hands of the tenant, as rent is. See for that, the case 40 E. 3. [24. pl. 25.] that great default is in the tenant if the rent be not paid, and he shall be adjudged a disseisor. Also, note the last proviso in the statute of 32, that against him who refuses or denies to set out his tithes, or detains them, remedy is only given in the ecclesiastical court.

Answer to
3-Obj.
In assize,
plaint of a
certain por-
tion of tithes
is good and
certain
enough.

“*Of a certain portion of tithes, &c.*” This seems good enough, and cannot be devised any better. And, first, It is common learning in the Book of Assize in divers places, that a man needs not use such precision and certainty in the plaint of an assize as in other writs of *præcipe quod reddat*; for in 8 Aff. [1.] wood was put

put before pasture in a plaint, which is contrary to the order and form of a *præcipe quod reddat*, according to the verse; and a plaint was of the annual rent of one robe, or twenty shillings, in the disjunctive, which would not have been good in a *præcipe quod reddat*; and of a *certain* piece of land, and that is good in assize without any contents certain. (a) So one brought a plaint in *D.* only, and there were two *D.*'s in the county, and neither of them without an addition, yet the assize and plaint was well enough; and the reason as I understand is, that the judgment in assize differs from other writs, for he recovers seisin of the thing put in plaint by the view of the recognitors, and it is sufficient if the thing in plaint be so certain and plain that the recognitors can put the plaintiff in possession. And now because this term "*portion of tithes*" is uncertain, and unknown in our law, it is necessary to consider its nature and quality for the ministering of our law now, because it is incorporated and made parcel of the body of our common law. I understand a *portion of tithes* to be where a man hath any profit of tithes within the parish of another parson, or vicar, and its origin was before the council of *Lateran*, at which time it was lawful for every one to distribute and pay as he chose his tithes, or any portion thereof, to any church, according to his best devotion; and there was no restraint to any church or parish in certain; so by continuance that grew to a right and title, and it was therefore given for prayer, or devotion, &c. Then to consider the certainty here, in every word of the plaint is certainty. First, the word "*certain*" is an adjective or relative which expresses a certainty and particularity, and especially in the singular number, unless it be coupled with an adjective or substantive uncertain, as "*a certain person unknown*," and "*of the death of one unknown*," &c." for then it does not make any demonstration; but being joined with a substantive certain, as "*in a certain place called*," it is otherwise; so here "*portion*" is a substantive, and by the words following, *s. of tithes of sheaves of corn, hay, wool, and lambs*, the kind and quality of the tithes are named and expressed: and here

(a) *T. 16 Jac. B. R.* Land in the parish of *A.* by prescription may be liable to the repairs of the parish church of *B.* and discharged from the repairs of that of *A.* *Green's case.*—*E. 43 El. B. R. Sir Miles Lands v. Drury*, [*Cro. Eliz.* 814.], the question in this case was, Whether tithes might be demised by copy of court roll? By *Dodderidge* they cannot; for although tithes have been immemorially to be paid, yet a parson might claim them before any other until the council of *Lateran*, and so their origin as to this church was by these constitutions, and not by custom.

1553.

the measure or quantity of tithes cannot be expressed; for although the defendant, in the year of the disseisin committed, took one hundred sheaves of corn, two cart-loads of hay, two stones or pounds of wool, and ten lambs, yet the disseisin is made of the entire tithe, which is a thing uncertain in number, for the goodness and fruitfulness of the year is casual and uncertain, and for that reason it is impossible to limit the portion more certainly. And besides, it is alleged and declared that this portion of tithe is a thing of long continuance and antiquity, and in the country there the certainty and quantity is well known, so that the plaintiff may well recover his seisin of this portion of tithes by the view of the recognitors, &c. wherefore, &c. And see *H. 11 H. 4.* [40. s. pl. 4.] In debt—*præcipe quod reddat* a certain portion of land is good by *Skrene*, and allowed by *Hill* without shewing how much that portion consists of. And besides the statute 32 *H. 8.* is plain, that assize and *præcipe quod reddat* lie for a portion of tithes; wherefore, &c.

Answer to
4 Obj.
32 *H. 8.*
c. 7. is a general statute,
and in assize for
tithes need
not be recited.

The statute of 32 *H. 8.* needs not to be set out; and that for two reasons: 1. Because that statute is general and universal, and runs over the whole kingdom, and concerns every person or persons who have any such spiritual profit: then the judges of every court are especially bound to take notice of this law, inasmuch as it gives them jurisdiction and power to hold plea of that, which, before the statute, the common law took no cognizance of; and such general law is not of necessity to be alleged: and this was ruled in error 37 *H. 6.* [15. pl. 5.] *sub fine*, in the exchequer chamber. Also in 4 *E. 4.* [22. a. b.] in the case of *Lord Hungerford*, in traverse, and other books: and so it is, when a man is acquitted by a general pardon, by parliament; and he, being arraigned, does not plead it, but puts himself upon trial, and is acquitted; he shall not have conspiracy, for he was not legally acquitted; since the judges ought to have allowed him his pardon without pleading it. And further, this statute doth not give any new writ or action which was not before at common law; but joins and annexes other things which are to be demanded by writs original at common law; by which they were not demandable before. And therefore it may be well likened to the case of 14 *H. 4.* [20. a.] in maintenance; where the case was, that conuizance of plea was granted to *Bristol* of all pleas; and afterwards, there was an action of debt given by statute for a thing, for which no action of debt lay before; they shall have conuizance of this action, because the same action

action was before at common law : but if the statute had given a new action which never was before, it is otherwise ; so here, &c. And this statute also gives a power and jurisdiction to the temporal courts to hold plea of tithes in these cases : and I never understood, that the plaintiff shall be compelled to shew the power and authority of the judges and court in his writ or declaration ; but that is for the defendant to allege, and to take exception to the jurisdiction of the court, as well as on account of disability of the person of the plaintiff, and things of that sort : and, for these reasons, I think that he is under no necessity to allege the statute, any more than it hath been usual for the statute of R. 3. [1. c. 1.] to be alleged, when a man pleaded a feoffment of *cessuy que use* ; or at this day, if a man plead a feoffment to an use, it is more than is necessary to allege the use, executed by force of the statute of uses 27 H. 8. [c. 10.] And so at this day, if a man will plead a devise by will, shall he be forced to allege the statute of wills ? It seems clearly he shall not. Wherefore, &c.

It seems also, that tithes are *demesne*, for they are tangible and visible ; and also the esples alleged in a writ of right of advowson of the church, or of tithes, are in *prender* of great tithes and small tithes, and in oblations, &c. therefore it is not like a reversion, suit, fealty, or such like, which are not tangible. Wherefore, &c.

Answer to
5 Obj.
Affize of
tithes in *de-
mesne* is
good.

It seems also, that the prescription doth not make the title double, for the seisin of the portion (only) doth not make a good title in the prior of S. any more than of a rent, or any other thing or profit in the soil or fee of another, which commenced against common right : for, in all these cases, the commencement of it ought of necessity to be alleged by him who is to make title to it, whether he be a privy or stranger thereto : for it is contrary to reason to charge the inheritance or freehold of another, without shewing a substantial foundation for it. Then here admit, that the prior had been seised of this portion, which ought to be intended to be in the parish of which the prior himself was neither parson nor vicar, shall this seisin make him a title to this portion without prescription ? I think not : and then the seisin is not material, nor traversable, but only the prescription ; for the king cannot make other title to it than the prior himself, who could by no means make out a good title to himself, but by grant or prescription. Wherefore, &c. Besides, the prescription declares the manner in which the prior was seised, *s. from time immemorial* ; and there, this only is traversable,

Answer to
6 Obj.
In affize for
a portion of
tithes, de-
mandant
prescribes in
the prior of
S. This is
not a double
title.

1553.

traversable, and not the seisin, for he cannot allege the prescription if he do not allege the seisin also : as in a *seire facias* to execute a fine, the seisin of his ancestor with a feoffment is not double, for he cannot allege the one without the other ; so here, &c.

Answer to
7 Obj.

“ *By virtue whereof.*” It seems that these words should, of necessity, be referred to all the mean degrees and steps before expressed, by which the said portion is conveyed to the possession of the king ; of which, the first degree is the seisin of the prior by prescription ; the second, the suppression of the priory by act of parliament in 27, with the averment that it was under the value of two hundred pounds *per ann.* and also one of the three orders or habits of religion, *s. monks, canons, and nuns* ; the third step is, that the king by the act is deemed and judged in actual and real possession of the portion : and all these matters are degrees and means to induce title to the possession of the king, and no one of them is sufficient to do this without the other, but altogether are. And the nature of these words, “ *by virtue whereof,*” is well explained and declared in 7 *H. 7.* [3, 4.] in trespass for trees cut and carried away, where it is holden, that the “ *by virtue whereof*” *nec auget nec minuit sententiam sed tantum confirmat præmissa* : as if the defendant there pleaded a feoffment of the soil where trees grow made to the plaintiff for the use of a stranger, “ *by virtue whereof*” the stranger granted the trees to the defendant, that is bad ; for the feoffment to an use did not make the grant good, without averring the continuance of the use until the grant of the trees, which thing is not implied by the “ *by virtue whereof* ;” wherefore, as I understand it, a better form of pleading could not be devised than was in this case.

Answer to
8 Obj.
It is sufficient to say in assize for tithes come to the king by the suppression of an abbey, that he is seised thereof *in his demesne as of fee*, without saying, *in right of his crown.*

“ *In his demesne as of fee.*” This seems good enough, without saying “ *in right of his crown,*” and is the best mode of pleading ; for it appears before, by the statute, that the king ought to have the said monasteries, to do with them according to his good pleasure, for the honour of God, and the weal of the kingdom : and then to make the law clear, and without any doubt, this is better pleaded than to say “ *in right of his crown* ;” for this might create an argument and doubt, whether he could sever it from his crown or not, although it seems sufficiently clear that he might ; yet to allege that which is dubious and disputable, when it may well be alleged fully and clearly, would be impolitical in pleading. And let us grant also, that it were necessary to allege “ *in right of his crown,*” still the manner of pleading before is such, that the king

king necessarily must be seised, as if the act gave it him by intendment, although it is not expressly alleged, for the statute annexed it to the crown. And see *E. 34. H. 6. [34. b.]* in *quare impedit*, this exception over-ruled, where conveyance was made of an advowson of king *Hen. 6.* who came to it by descent, and it was parcel of the possessions of alien priors, which were annexed to the crown by parliament in the time of *Hen. 4th* or *5th*.

(a) It seems that it is not necessary to mention the dean by his name, any more in the conveyance of the title for the portion made to the dean and chapter, than in the original writ of assize. And no one will deny, but when a dean and chapter, who are an entire body politick, are to commence any action, the best way is to omit the name of the dean, for fear of a change of the dean by death, or otherwise, by which the writ may abate, as is adjudged in *21 E. 4. fol. 19. [15. a. b.]* And I take a great diversity between where one is sole seised in right of his deanery, and where in common with the chapter; for it may be agreed for law in the first case, that if the dean alone be entitled to an action real, he must call himself by his christian name, that it may appear whether the cause of action commenced in his time, or in the time of his predecessor. As, if a disseisin be made to a dean, or an erroneous judgment, or false oath, and he die, his successor shall not have an assize of novel disseisin, but a writ of entry upon disseisin in the *quibus*, or a writ of error, or attain, and name himself, because he was not a party to the judgment; but in the other, *s.* where the dean is seised in common with the chapter, there, although he die, still his successor, and the chapter together, shall have assize of novel disseisin, or error, or attain, as the case is, without naming the dean in certain, because the dean is not dead, but hath always continuance, And therefore in *14 H. 7. [31. b.]* it is holden, that a dean and chapter, or a prior and convent, without naming the superior by his proper name, granting by their common seal an annuity until promotion to a benefice by the aforesaid dean or prior, their successor may tender a benefice; but if they be named,

Answer to
9 Obj.
Dean and
chapter
bringing
assize for
tithes, need
not mention
the dean by
name.

(a) *H. 31 El. [1 And. 248.] Carter v. Crumwell*, in *ejectio firmæ*, the plaintiff declared upon a lease made by the warden and college of *All Souls* in *Oxford*, and exception was taken because the christian name of the warden was omitted, and it was adjudged unnecessary; and a difference taken where the corporation consists of one person only, as a bishop, there he should be named; otherwise, if of many, as a dean and chapter, mayor and commonalty.

there

1553.

there the contrary is holden, because the aforesaid dean or prior shall refer only to the dean or prior by name, and to none others. And here the proper name of the corporation and body politick is *the dean and chapter of B. &c.*; and by this name they are enabled to purchase, sue and be sued, and not by any christian name. And also the truth in this case is, that the dean, who was the plaintiff in the assize, was the first dean of this corporation, the commencement of which was only in the 24th of *Hen. 8.* which is only seven years since the erection; wherefore it can no otherwise be intended but the same dean to whom the first grant was made: and see 13 *E. 4. 8. b.* holden by *Choke*, that although it is usual to allege the name of the mayor, who is the head of the corporation, yet he had seen such general pleading, without naming the head, adjudged good. And see a good case of that, *H. 17 E. 3. [1. b.]* of a *scire facias* brought by the successor of a dean and chapter, upon a recovery against an abbot, since dead, without naming the proper name of the dean, but of the abbot; he shewed a diversity between the late abbot and the present abbot, but that cannot be of a dean and chapter.

Answer to
to Obj.
In assize of
tithes, plaintiff
that K. H. 8.
gave them
per nomen of
those tithes,
arising out
of the demesne
lands
of the arch-
bishop of
York, and
lately in the
tenure of T.
It is not ne-
cessary to
aver that
the lands
put in view
were the
demesne
lands of the
archbishop in
the tenure
of T.

It seems too, that no averment is necessary; and that for diverse reasons: 1st. The plaintiffs, in the premises and commencement of their title, shew, that the portion of their tithes, now in plaint, is issuant out of two hundred acres of land, &c. in *N.* whereof the late prior was seised in fee by prescription; and that before any title or seisin in the king; and then they proceed in their title, and convey it by due and legal means to the king; and that the king was seised of that in fee, and so being seised, made a grant to them of the portion aforesaid, by the name, &c. so that the foundation of their title was not of the king only, but they also make conveyance of the king's title, s. from the prior: and then it much varies the case, whether the title have its origin of the king only, for then perchance all the words in the king's grant ought to be verified, and especially when it wants certainty. As where the king granted *all his lands which he had by the attainder of I. S.* if a man would convey by such grants, he ought to aver that *I. S. had such lands, &c.* The law is the same in the case of a common person who releases *all his right in all such lands as descend to him of the part of his mother in D.* there ought to be an averment that *the lands, &c. descend of the part of his mother*; for otherwise, the release is void, by reason of the generality and uncertainty, &c. And see this 2 *E. 4. fol. ult.* And yet in 1 *H. 7. [28. b. 29. a.]*

In assize, it was ruled by all the judges, that if a feoffment be made by deed of lands by the name of *all the lands which he hath of the gift of such a one*, the tenant ought to plead this feoffment by deed, without taking any averment: as, if it were made to him by the name of *I. S.* where his name is also *I. D.* because he may be known by one or the other; otherwise is it of a christian name; but there it is holden, that the best pleading is by the name comprised in the deed: and therefore in 26. Ass. [119. a. pl. 2.] it was ruled in an assize brought in *D.* where the tenant pleaded jointenancy of the land in plaint, by a deed of land in *S.* that that was good enough, without averring that *S.* is an hamlet of *D.* because the vill may have two names, the one true, and the other a nick-name. (a) So, when any certainty is in the grant, although there be a superfluous addition in the grant, that is not material, nor shall impair it: as is the case in 20. Ass. [8.] A man made a grant of twenty cart-loads of wood in the wood of *D.* *which he had of the gift and grant of his father*; the grantee was not driven to shew any writing of the father, because by the premises the soil was sufficiently charged, &c. And so in the case of 9 H. 6. [12.] of an annuity granted by the queen, *percipiend' de magna custumar' of London*, the grant was ruled good, and the *percipiend'* void, &c. And so in 2 E. 4. [29. b.] A man released all his right in *White-acre* in *D.* which he had *by hereditary descent* from his father, although he had it *by purchase or disseisin*, it is well enough, &c. Then here, at the time that the king granted this portion of tithes which appertained to the said late prior, it may be that the said two hundred acres whereof, &c. were the *demesne of the archbishop of York*; and then the king inserted these words in his grant, to make it more certain, and to give another name to the portion which it had before; for before, it was known by the name of a portion of tithes in *N.* belonging to the priory of *S.* and by that name it appears that the king in his grant assented; but he added more to that as above, which addition is peradventure false, and perhaps true: and so *of the tenure of E. Tame*. And if neither of them were true, yet by the statute 34 & 35 H. 8. c. 21. this

(a) Customs and subsidies have been formerly assigned by our kings to their subjects, as H. 6. assigned over to Cardinal Beaufort, ann. 22. for his security for a debt of sixteen hundred pounds due to him, the customs of *London* and *Southampton*. So Edward 4. anno 12. secured his debts by assigning over the next subsidy and aid that should be granted from the church or laity. Act. Conf. 22 H. 6. Bill Signat. 12 E. 4.

1553. mis-recital of *late farmer or occupier* does not make the patent void. Then if the portion passed by the patent, that sufficeth for the plaintiff; for it would have been folly to take an averment of this title to a thing which was false, and which is immaterial whether false or true, as the case is here. And the counsel of the plaintiff would ill have deserved their fee (of whom I was one), had they alleged this averment of the title in the plaint, which had it been found false, ought to destroy the entire title of the plaintiffs, &c. Wherefore, in my opinion, as it is here pleaded, the portion of tithe is conveyed sufficiently from the prior to the king, and from the king to the plaintiff by name, &c. And the pleading is "*the aforesaid portion*," which cannot be any new one, or other portion derived from the king; and since the defendant hath demurred in law upon this plaint, he hath acknowledged that the king's grant was of the same portion that issued out of the land put in view, &c. And, therefore, I think the pleading good without averment, &c.

M. 1 & 2 ELIZ. A. D. 1558-9.

Peltes again? Saunderson in *B. R.* [Dyer, 170 b.]

On a prohibition to a suit for tithes of [** Orig. Cur.*] wheat, the land being suggested to be lately improved, was proved to, but that tithes of *wheat* and *lawbs* had been always paid for it: though by the statute the same tithes continue payable for seven years, the parish cannot have a consultation, for he has not sued for tithes of these.

(a) THE farmer of a rectory sued one of his parish in the ecclesiastical court for tithes of *wheat* and *rye* growing in sixty acres of land, and the defendant ** sued* a prohibition upon the statute 2 & 3 E. 6. [c. 13.] suggesting that all the sixty acres were

barren

(a) Fens or marsh grounds which are drained shall pay tithes in 6- [7] years, and not sooner, 2 E. 6. c. 13. *Trin.* 35 EL. B. R. — *Hil.* 5 CAR. C. B. *Scowie's case*. It was resolved that tithes are due and payable of all mills, unless they be as ancient as 9 E. 2. and before; for mills more ancient are disencargen of tithes by the stat. *Ant. Cler.* [c. 5.] — *Hil.* 5 CAR. C. B. Between *Pain* and *Erwin*, a prohibition was awarded to the bishop of *St. Asaph*, where it was awarded that tithes shall not be paid of ancient mills, s. before the time 9 E. 2. and there also it was holden by the court, that if such ancient mill fall, and be rebuilt upon the ancient foundation, the discharge of tithes shall hold good and revive. — *Lup.* 10 CAR. Serjeant *Hutcheon* moved, that before the statute *de cetero* no tithes at all were payable for mills, but the said statute was *lex iuris creativa*. But *per Cur.* it was adjudged that the common tradition, that no tithes are due of ancient mills, is to be understood of very ancient mills, s. before 9 E. 2. only; for after that, and before memory of our ancestors, they ought to pay tithes. *Bro.* [Prohibition.] The case of *Tanner* and *Hickman*, in [Coke's] *New Book of Entries*,

barren heath and waste grounds, and by reason of the barrenness have not been charged within time of memory with any tithes until the plaintiff had improved thirty acres of it, and converted it to tillage, &c. so that by the intendment of a proviso in the said statute, (although by express words such ground is not discharged of tithes for seven years after the improvement), he ought to pay no tithes within seven years, &c. and proved that suggestion within the six months by witnesses according to the act. And upon the attachment the parties appeared, and the defendant in it defended the contempt, &c. but he took no traverse to it; for it is not the practice in *B. R.* as it is said; and pleaded that the said sixty acres were fruitful, and not barren, as the plaintiff supposed, and upon this joined issue with the plaintiff; and it was found by verdict, that as for thirty of the said acres they were barren, as the plaintiff had suggested; and as to the residue, they found that it had paid tithes of *wool* and *lambs* at all times, &c. (a) And by the opinion of the judges of both benches, (except *Whyddon*), the party who sued

463.—Barren ground is understood by the opinion and judgment of the common law, to be whereof no profit ariseth or groweth; and that ground which hath been stubbed, and after beareth corn or grass, is not barren. Waste ground is understood such ground as no man doth challenge as his own, or no man can tell to whom it certainly belongeth, and lieth uninclosed and unbounded with hedge and ditch; but the ground that lieth inclosed and hedged and ditched in, and the land known, is no waste ground. *Quod nota per Curiam.* Heath ground is understood that ground that is dispersed, and lieth at common. Bendlofe [80. pl. 122.]—*E. 41 Eliz. A.* sued in the court christian for tithes of pigeons, and other tithes, and had sentence, although the defendant had tendered one single witness of the payment of tithes of pigeons; and upon this suggestion a prohibition was awarded, and afterwards a consultation for the residue; with exception that they in the court christian should not proceed to give coills for the pigeons.

(a) *M. 42 & 43 Eliz. Rot. 227. B. R. Webb v. Beal* [Cro. Eliz. 819] Upon prohibition the plaintiff suggested that he had been used from time whereof, &c. to pay three shillings and four-pence for all great and * *small tithes* except corn growing upon seventy acres of land, and made his proof by two witnesses according to the statute; but they testified that the course was to pay four shillings, and by the judges a prohibition was awarded; for although he has failed in the proof of his prescription, yet so much is proved, that the spiritual court has no cause to proceed for tithes in kind. *Dodderidge* said, that *M. 34 and 35 El. Bird and Collingworth*, in a like case a consultation was awarded. *Popham* answered, that the opinion of the judges of *C. B.* is now to the contrary, for when a *modus decimandi* in one sort is suggested and another proved, we ought not to award a consultation to give them authority to sue for tithes in kind, but to sue for tithes in such kind as is proved.

* The original is *nient*, perhaps for *nient*, (less), by mistake.

1558-9. in the spiritual court shall have a consultation for the said residue: to which *Saunders*, Chief Baron, agreed. Note, the above statute was mistaken, for the parliament was supposed to commence on the 4th day of *November*, in the 2d year of *E. 6.* which was false, for it was a session by prorogation. And yet afterwards, upon better advisement and examination of the verdict, which in the premises of it is found for the plaintiff in the prohibition, *s.* that it was barren, as the plaintiff had supposed, and that it was so barren, that on account of the barrenness thereof none had paid tithes, although afterwards they find that for thirty acres they had paid *wool* and *lamb*s; and because by another proviso in the same act, such tithes as were paid before shall be paid within the seven years after the improvement, *&c.* and not any tithes of other nature; and because the libel was not for other tithes in the said sixty acres, but only for *wheat* and *rye*; the party could not have a consultation, but was told that he might commence a new suit in the court christian for tithes of *wool* and *lamb*s in the thirty acres not improved.

T. 10 Eliz. A. D. 1567.

Stathome's Case. [Dyer, 277 b.]

Lands in the hands of the prior of St. John's of Jerusalem are exempt from tithes, but his farmer pays—he makes a lease, and during the term the house is dissolved, and the king grants the reversion, his patentee shall hold the land free from tithes, but his lessee shall pay.

(a) THE prior of the dissolved house of *St. John's of Jerusalem* had this privilege from *Rome*, *s.* “That the Cisterians, “Templars, and Hospitallers, should not be bound to pay the tithes “of their farms which they cultivate with their own hands, or at
“ their

(a) This privilege of the *Cisterians* extends to their woods, and meadows, and pastures, as *Foster* cites to have been adjudged, that pasture near *London* which was in the hands of the hospitallers was discharged from tithes.—*Mich.* 18 *Jac. C. B.* it was said by the court that the council of *Lateran* made in 17 *John* [See 2 *Inst.* 652.] discharged the friars of the order of *Cisterians*; and that this only discharges all possessions then in their hands, and not others. [Bul. Ni. Pl. 189.] *Hil.* 2 *Jac.* between *Quarles* and *Spruling* [Cro. Jac. 57. Mo. 513], it was adjudged, that the lands of the prior of *St. John* should pay tithes in whatever hands they are, because they were not dissolved by the statute of 31 *H. 8.* [c. 13.] but by a special statute of 39 *H. 8.* [32 *H. 8. c. 24.*] which is as high a means as the statute of 31 *H. 8.* And the statute of 31 *H. 8.* which says that the lands shall be discharged which afterwards come by any means, shall be construed by any inferior means, according to the resolution in the archbishop of *Canterbury's* case. [2 *Co.* 46.]—*Hil.* 17 *Jac. B. R. Porter v. Bathurst*. [Palm.

"their own expence;" but their farmers and all other occupiers paid tithes according to the statute 2 H. 4. c. 4. The said prior with his brethren made a lease of a manor for years, two or three years before the dissolution, which lessee paid tithes to the church of *Rochester*, as appropriate. And after the dissolution the king granted the reversion of the manor to one *Stathome*, and to his heirs, in as ample manner as the prior, &c. The lease is expired; Whether he and his heirs, having the manor in their own hands, shall be discharged of tithes or not, was in question in the chancery. And upon considering the statute 31 H. 8. c. 13. it seemed before the lord keeper to *Cutlyn*, *Saunders*, *Southcot*, and *Dyer*, and to his lordship himself, that they shall be discharged until they let and set it to farm, &c.

1567.

H. 17 Eliz. A. D. 1574.

[Plowd. 470.]

It appears by the record, that the plaintiff complains against the defendant, for that whereas by the statute of 45 Ed. 3. c. 3. it is ordained that no tithes shall be given of great trees of the growth of 20 years, and more, yet the defendant hath drawn him into the

The case.
Hil. Term
17 Eliz.,
Hornbeam-
pollengers,
though of the
age of 20

years and more, are not such great wood as is intended by the statute of 45 Ed. 3. c. 3. for they are not timber, nor serviceable in building, but only fit for fuel, and therefore if they are cut down at that or any greater age whatever, tithes shall be paid for them, and by the same reason tithes shall also be paid for the branches and loppings of them, though they are of the age of 20 years and more.

[Palm. 118. 2 Rol. 142. Cro. Jac. 559.] In a prohibition a suggestion was, that the abbot of *R.* was seized in fee of the manor of *A.* from time whereof, &c. and that the abbot was of the order of *Cisterians*, which order was discharged, &c. and died. Stat. 31 H. 8. Issue was joined that the abbot did not hold it discharged in manner and form: the jury found as above, and moreover, that in 15 H. 8. *William*, then abbot of *R.* leased for thirty years, and that during this lease the abbey was dissolved, and the lessee at the time of the dissolution paid tithes. And whether that shall be a sufficient discharge for the now feoffee who manures, and occupies it in his own hands, was the question. And judgment was given that tithes should not be paid. *Montague*, Chief Justice. Where the suspension is by lease, and [there was] payment of tithes, in case of unity there the prescription is destroyed, but where the prescription is by reason of the order there, although it be in lease at the time of the dissolution, still the privilege of the order remains when the land comes back into their own hands. It was resolved by all the justices, *B. R. M. 2 Car.* that tithes should not be paid by farmers of the lands of *St. John of Jerusalem*, of such land as was in the hands of the priory. See the case between *Quarles* and *Sparling* in prohibition, *M. 1 Jac.* in the star-chamber, adjudged *contra* to this, and this house of *St. John's* came to the king by the act of 34 H. 8. And it did not give exemption of tithes, as the statute 31 H. 8.

1574.

court christian, the 20th day of *April*, in the 14th year of the present queen, for withdrawing the tithes of branches, called Loppings, of certain great trees growing in a place called *Gine's Park*, within the parish of *Tbaidon-Garnon*, and cut down by the plaintiff, where in fact the said trees, and also the branches cut down, were of the growth of 20 years, and more. And to this the defendant has pleaded in bar, that the branches called Loppings of trees, for the tithe whereof he sued, were branches of trees called Hornbeam-pollengers, growing in the said place called *Gine's Park*, within the said parish, and that the said trees, upon which the said branches grew, were topped and lopped before any of the branches, for which the tithes were demanded, grew, and therefore that he (the defendant) being parson at the time of cutting them down, drew the plaintiff into suit for the tithes, as it was lawful for him to do. And upon this they demurred in law.

And the matter was argued at large at the bar, by *Atkinson* on the one side, and by *Anderfon* on the other side. And *Bell*, an apprentice, was also of counsel in the case. And he spoke to the matter the same day with the other counsel, after their arguments on both sides. And it was said against the defendant, that he ought not to have tithes here, because the trees are old trees above the age of 20 years, in which case they are an inheritance; and for cutting down trees above the age of 20 years, a man shall have an action of waste, and shall say therein that the termor has cut them down to his disherison. And if a man has an inheritance in the trees, and they themselves are an inheritance, thence it follows that no tithe shall be paid of them, for tithes are payable of the increase of the inheritance, as of hay, apples, and such like, which are chattels, but not of that which is an inheritance in itself, as trees above the age of 20 years are. And this is proved by the said statute of 45 *Ed. 3. c. 3.* which ordains that touching tithes of great wood of the age of 20 years, or of greater age, a prohibition in such case shall be granted upon attachment, as hath been used before this time; which words (as hath been used before this time) shew us what the common law was, and that at the common law, tithes were not payable for great wood before the said statute, so that the statute is made in confirmation of the common law. And to this purpose was cited the opinion of *Belknap*, in 50 *Ed. 3.* in the case of an attachment upon a prohibition for a suit in the spiritual court for the tithes of great trees, where he says, "it never was seen that tithes were demanded of great trees, nor of
" timber;"

1574.

"timber;" which saying of his was within five years of the making of the said statute of 45 *Ed.* 3. So that he who lived in the time before the act was made, testifies that there never was an instance before the act where tithes had been paid of such great trees, and the reason thereof is, because they were an inheritance of themselves. And as tithes shall not be paid of the trees themselves, so shall not they be paid of the branches which come of the loppings and topplings of the great trees; for if the tree itself, which is the principal, be excused from paying tithe, so shall the branches thereof, which follow the degree of the principal, be also excused, and especially in this case, because the branches are of the age of 20 years and more, which age makes them to be accounted great trees themselves. And for these reasons it was prayed, that the defendant might be convicted of the contempt.

And the justices did not argue the matter openly, but at last they agreed among themselves, that tithes were due to the defendant in this case, and they granted him a consultation. And because they did not openly declare the reasons of their judgment, I afterwards inquired them of *Wray*, chief justice of *England*, who told me that the reason, upon which he and his companions gave the judgment, was, because the trees are of a base nature, and are not timber, nor can be of any service in building, for they cannot in their nature endure long, but they are only fit for fuel, and other trifling uses. And therefore, if the hornbeams themselves had been cut down, tithes should have been paid for them, and by the same reason they shall be paid for the bows and branches of them; for the branches, which are of the age of 20 years and more, shall be of the same nature with the trees out of which they spring and grow, and of no other nature. For if the tree itself is privileged from tithes, so shall the germins above 20 years of age which grow from it be privileged, as the germins of that age of oak and ash, and such like, shall be exempt from the payment of tithes as well as the oak or ash itself shall; for he said that a branch above 20 years of age of an oak, or ash, or the like, may be of service in building, and therefore it shall be exempt from tithe, as well as the principal tree shall. But hornbeams shall pay tithes, though they are of the age of 40 or 50 years, as hawthorns, or fallows, and the like, shall do: and the *great wood* specified in the said statute, is to be intended of wood which consists of trees of value, as of oaks and ashes, and elms, and such like, but not of hornbeams,

1574. beams, (a) fallows, hafels, maples, and the like, which in all ages ought to pay tithes, and so shall the branches which sprout from them, of what age soever the same be. And all this he said to me, and for this reason they granted the consultation, as he said.

(a) Watt. Compl. f. cumb. says that peradventure the scarcity of other timber, and the custom of the country to put these sort of trees to the uses of good timber, may free them, being 20 years growth or more, from the payment of tithes, Noy 30, *Pinder v. Spencer*.

17 Eliz. A. D. 1575.

Windham against *Norris*. [Toth. 285. In Ch.]

Chancery hath jurisdiction of tithes.

A Demurrer, because the matter concerneth tithes, over-ruled, and ordered.

E. 18 Eliz. A. D. 1576.

The Parson of *Peykirke's* Case. [Dyer, 349 b.]

Prohibition lies to a suit for tithes of hay and grain, where the lands in the hands of an abbot and his farmers have from time immemorial been charged with tithes of wool and lambs only.

THE parson of *Peykirke* and *Elmeton* juxta *Peterborough*, of which the abbot of *Peterborough* was patron, and also owner of the manor of *Elmeton*, being a hamlet of that parish, at this day demanded tithe of hay and corn out of the demesnes of *Elmeton* manor, of which the present dean and chapter of *P.* are both patrons and owners; whereas within time whereof memory runneth not to the contrary before the dissolution of the abbey, and at the time of the dissolution, no such tithes, but only other tithes, as of wool and lambs, &c. were paid by the farmers by lease, or at will, being lay persons. Whether a prohibition upon the statute of 31 H. 8. [c. 13.] by virtue of this word *discharged*, will lie or not? And by the opinion of the justices and clerks of *B. R.* prohibitions in this case are common, &c.

M. 18 & 19 Eliz. A. D. 1576.

Grendon v. Bishop of *Lincoln*. [Plowd. 493.]

The case. The king being seised of an advowson in right of his crown, grants it by his letters patent to dean and chapter, when the church is

IT appears by the record, that the plaintiff has declared, that king *Edward* 6. was seised of the advowson of the church of *Dean* as of grofs by itself, as of fee and right, in right of his crown, and the same being vacant, he presented to it one *William Chamberlain* his clerk, who was admitted, instituted, and inducted: that the king died, and the advowson descended to queen *Mary*, who in the first year of her reign granted it to *George Rotherham* and *Roger Barber*, and to their heirs, who granted it over by deed in the first and second years of *Philip* and *Mary* to *Thomas Grendon*, and to

to his heirs, who died thereof seised, and the advowson descended to Roger Grendon the plaintiff, as his son and heir; and afterwards the church became vacant by the deprivation of the said *Chamberlain*, whereby it belonged to the plaintiff to present, and the defendants disturbed him. To this the bishop pleaded that he claimed nothing but as ordinary. And the dean and chapter said, that long before the said king *Edward 6.* had any thing in the advowson, king *Henry 8.* was seised of the said advowson as of gross by itself, as of fee in right of his crown, and being so seised, he presented one *Edmund Haltman* his clerk, who, on his presentation, was admitted, instituted, and inducted; and the king died seised, and the advowson descended to the said king *Edward 6.* and he being seised thereof, the 22d day of *May* in the first year of his reign, by his letters patent shewn forth, of his certain knowledge and mere motion gave and granted the said advowson to the said dean and chapter, to have and to hold to them and to their successors for ever: and further, the same king of his special grace, certain knowledge, and mere motion, and by his royal authority supreme and ecclesiastical which he then had, for himself and his successors, granted and gave license to the same dean and chapter, and to their successors, that whensoever by death, resignation, deprivation, or in other manner the said church should be vacant, the same dean and chapter, and their successors, might immediately hold the parsonage of the said church to their proper use, to them and to their successors for ever, without molestation or hindrance of the same king, his heirs and successors, and that without any presentation, induction, or admission of any incumbent to the same parsonage from thenceforth: and further the same king willed and granted, of his certain knowledge and mere motion, and by his authority aforesaid which he then had, for himself, his heirs and successors, to the same dean and chapter and to their successors, and to the said cathedral church appropriated, consolidated, united, and incorporated the aforesaid parsonage and church of *Dean*, as it should afterwards happen to be void, as is aforesaid, and all messuages, lands, tenements, glebes, tithes, and hereditaments whatsoever, as well spiritual as temporal, to the same parsonage and church, so as is aforesaid being vacant, in any manner appertaining; to have, hold, enjoy, and convert the same parsonage and church of *Dean*, and all other the premises, to the said dean and chapter, and to their successors, as is aforesaid, to their proper use, without any presentation, nomination, induction, or admission

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full, and that they may hold the rectory of the said church, immediately after it becomes void, to their proper use, to them and their successors for ever, without presentation, &c. of any incumbent to the same rectory at any time after, and appropriates, consolidates, unites, and incorporates the same rectory and church, and all, &c. belonging to it, to them, and their successors, to hold to their proper use; if this is a good appropriation.

Raft. Entr.
407 b.
N. Bendl.
293. S. C.

1576. admission of any incumbent to the same church thenceforth, as by the same letters patent among other things appears: by force of which letters patent, the said dean and chapter were seised of the said advowson as of grofs by itself, as of fee, in right of their cathedral church: and they being so seised, the said *Haltman* died the 6th day of *November*, in the 4th year of the reign of the said king *Edward 6.* by whose death the church became void, whereby the said dean and chapter, immediately after the death of the said *Haltman*, became parsons of the said church, and the said parsonage and church of *Dean* to their proper use held and yet hold, and thereof then immediately and ever since have been and yet are seised in their demesne as of fee, in right of their cathedral church: and after the death of the said *Edmund Haltman*, the said king *Edward 6.* presented to the said church the said *Chamberlain* as his clerk, which presentation, admission, and institution of the said *Chamberlain* thereto specified in the count was void, and of no effect in law, because the said church was then full of the said dean and chapter: and thereupon they demanded judgment. And the plaintiff, as to the bishop's plea, prayed judgment, and had it, but execution thereof to cease until the plea between the plaintiff and the defendants was determined. And as to the plea of the dean and chapter, he demurred in law.

And the matter was argued at the bar and also at the bench in *Michaelmas* term, in which the 18th year of the reign of queen *Elizabeth* ended, and the 19th year of her reign began. And I heard the whole argument of *Dyer*, chief justice, and a great part of the arguments of each of the other justices.

The division
of the mat-
ter.

As to the matter in law, it was digested into divers points. First, what person is capable of an appropriation; secondly, what persons may make an appropriation, and how many ought to assent to it; thirdly, at what time an appropriation may be made, viz. if it may be made as well when the church is full as when it is void; fourthly, if a usurpation may be had upon a parson impropriate, and if by the usurpation of a stranger, the church may be disappropriated; and lastly, if all the things requisite concur in the appropriation here pleaded.

1st Point.
By the com-
mon law
none but a
spiritual bo-
dy politic
or corporate
is capable of
an appropriation.

And as to the first point, the justices were of opinion, that none but a spiritual body politic or corporate, which hath succession, is capable of an appropriation. For the effect of an appropriation, as to its original institution, was to make somebody perpetual incumbent, and as such to have the rectory, and the houses, glebe, and

and

and tithes which are parcel thereof. And in that he is made parson, he has the cure of the souls of the parishioners, in which case he ought to be a spiritual person: for as a patron ought to present to a church a spiritual and not a temporal person, so for the same reason an appropriation ought to be made to a spiritual and not to a temporal person, for the one has cure of souls as well as the other, and there is no difference between them, but that the one is parson for life, and the other and his successors are parsons for ever; and therefore appropriations were originally made to abbots, priors, deans, prebendaries, and such others who could minister the sacraments and perform divine service, and to none else. And upon this principle it was originally taken, that such parsons imparsonees could not grant over their estates to any other; for at this day an incumbent of a parsonage presentable cannot grant over his incumbency to another, altho' he may make a lease of the glebe and tithes, but he ought to resign, and then the patron and bishop may make a new incumbent, so that the incumbency, which is a spiritual office, cannot be granted over to another; and by the same reason a perpetual incumbent could not originally grant over to another his estate, which contains the incumbency and the rectory itself, which was the revenue of the incumbent. And upon this ground is the saying of *Herle* in 3 *Ed. 3.* where a *quare impedit* was brought against the prior of *Saint John's of Jerusalem* in *England*, (to whom the possessions of the dissolved order of templars, who had certain parsonages appropriated to them, were conveyed), upon a disturbance to present to a church which was appropriated by the earl of *Richmond* to the said templars; and there *Herle* said, if the templars after the appropriation had granted over their estate of the appropriation to hospitalers, the hospitalers should not thereby have had the appropriation, for it was granted only to the templars, who could not by their deed make an appropriation to others; and he said further, that that which was appropriated to the templars was become disappropriate by the dissolution of their order; wherefore it was thereupon said to the court, that the same estate which the templars had was conveyed to the prior of *St. John's* by the grant of the pope, and of the king, and by parliament. So that by the opinion of *Herle* an appropriation could not be transferred from one to another. And not without great reason; for it contains a perpetual incumbency (which is a spiritual function) appropriated to a certain spiritual person, which could not by law be removed from them to whom the church was first appropriated, by any grant afterwards to be made by them.

At first appropriations were made to sole corporations spiritual, who could administer the sacraments, and perform divine service, as abbots, priors, deans, prebendaries, &c.

Appropriations not grantable over.

And

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Afterwards appropriations were made to spiritual corporations aggregate, who cannot all together say divine service, as to dean and chapter, and at last to nuns.

And although originally appropriations were only made to such spiritual persons as could minister the sacraments, and perform divine service, as abbots, priors, deans, and such like, yet in process of time they began by degrees to shake off that restraint; and they were afterwards made to others, as to dean and chapter, (which is a body corporate consisting of many persons, which body together cannot say divine service), and to nuns, (who were prioresses of any nunnery, and could not minister the sacraments, nor say divine service to the parishioners), which was *grande nefas*, as *Dyer* termed it; and this was done under the pretence of maintaining hospitality. And in order to supply these defects in the persons to whom such appropriations were made, who could not themselves perform divine service, a vicar was afterwards devised, who was deputed to priors, or to dean and chapter, and at last to abbots themselves, and to others, to say divine service for them, and he had but a small portion allotted him, and they to whom the appropriations were made retained the great revenue, and did nothing for it, and as the revenue decayed, so did preaching and hospitality in the parsonage, and other good works, which was a great misuse as it seemed to the judges. And all this was done under pretence of hospitality, which in fact was the ruin of hospitality, and especially in the parish, where it should chiefly be kept up. But yet such appropriations were never made but to a spiritual body, which had successors and not heirs, in which succession the patronage, incumbency, and the fruits of the benefice might for ever remain; and a marriage was made between them, (as the lord *Dyer* termed it), so that the one should not be divorced or separated from the other at any time. And in order to perfect such marriage, it was requisite that the patronage, which is another thing than a spiritual body, should be in such spiritual body politick or corporate as should be perpetual incumbent; for the patronage is a thing temporal, to which the incumbency which is a thing spiritual ought to be conjoined, and that cannot be if they are in several hands, for separation and conjunction are directly opposite and contrary to each other. Wherefore a spiritual body politick or corporate, being the patron, is only capable of an appropriation.

2d Point. Appropriations ought to be with the assent of the ordinary, the patron, and the king.

As to the second point, *viz.* what persons may make an appropriation, and how many in number ought to assent to it; all the justices unanimously agreed that the ordinary, the patron, and the king ought to agree to it, and these are *actores fabulæ*, as *Dyer* termed them. And first the ordinary inferior or supreme ought to agree to it, because he is the principal agent in it, for he has the spiritual

Spiritual jurisdiction, and the act of appropriation is a spiritual thing; and the ordinary says, *appropriamus, consolidamus, et unimus*, as principal actor in the cause, (as *Manwood* justice said), because the cure of the church principally concerns the souls of the parishioners, of whom the bishop hath the charge within his diocese, for which reason the law has attributed to him the principal part in the appropriation. And, it was said, it appears in a case in 6 *H. 7.* (which then commenced, but was not adjudged until 11 *H. 7.*) that a union and an appropriation belong to the bishop to do, and where a union was there made of a chappel in one diocese to a college in another diocese, the assent of both the bishops was pleaded, and a great number of cases and precedents in the book of entries were cited, where the bishop of the diocese had made appropriations, (which cases I will not here recite, my intent being only to make a brief report of the matter, *sed summa sequor fastidia rerum*).

And that which the ordinary of the diocese might do, the same was used to be done within the realm by the pope, as supreme ordinary, who claimed to himself a supreme jurisdiction above all ordinaries; and it was long suffered to be done by him, so that he used to make visitations, corrections, dispensations, and tolerations within every diocese of this realm, as the ordinaries use to do, (as *Mounson* said), and he took from the bishops of this realm whatever and as much as he pleased. In consequence of this custom he used to make appropriations without the bishop, which were taken to be good, and the bishop, who was only looked upon as inferior ordinary, never contradicted or opposed this practice, but it was submitted to and accepted as good; for (as *Manwood* said) *in presentia majoris cessat potentia minoris*. And so an appropriation made by the pope alone, without the ordinary, was taken to be good. And hereupon *Manwood* cited the case in 29 *Ed. 3.* in a *quare impedit* brought by the earl of *Salisbury* against the prior of *Mountague*, where an appropriation was pleaded to be made by the apostle, with the assent of the king, without mention of the ordinary, which appropriation was allowed to be good; and he said that the pope was called by the name of *apostle*. And many other cases were cited to the same purpose. And the pope used to make provisions until he was restrained by the statute of 25 *Ed. 3.* which provision was a designation of the person who should be incumbent, and an admission, institution, and induction of him without going to the bishop. So that his authority was looked upon as absolute, and bound

The pope used to be looked upon as supreme ordinary, and made appropriations without the bishop, who was only deemed inferior ordinary.

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bound the bishop as his inferior in all his acts. And so it was agreed by the whole court.

The authority which the pope exercised in this realm being acknowledged by parliament to be in the king, consequently he, as supreme ordinary, may make an appropriation of his own authority without the bishop, where he himself is patron.

And such authority and jurisdiction as the pope used to exercise within this realm was acknowledged by the parliament in 25 *H. 8.* and in other statutes, to be in the said king *Henry 8.*; so that he might lawfully exercise such jurisdiction as the pope used or was accustomed to exercise within this realm. And from him this authority descended to king *Edward 6.* who made the appropriation here, so that he being supreme ordinary might make an appropriation of his own authority and jurisdiction without the bishop, for which purpose he inserted in his charter these words, *by our royal authority supreme and ecclesiastical which we enjoy.* And other like acts of jurisdiction and authority he might do, which the bishop of *Rome* was used to do in this realm. And hereupon *Dyer* said, that in a late case in the common bench between sir *John Pollard* and *Walrond*, he and all his companions declared the law to be, that a resignation which the dean of *Wells* had made to the king was good and effectual, inasmuch as the king was head of the church of *England*, and that it was as good as if it had been made to the bishop, and thereby the deanery became void. Wherefore all the justices agreed that an appropriation made by the king alone without the bishop is as good as if the bishop had made it, or as it was taken in ancient time to be when the pope made it.

But although the ordinary, inferior or superior, is the person who ought to make the appropriation, yet he cannot do this without the will of the patron. For the patron has a temporal inheritance in the advowson, viz. a fee-simple, which neither the ordinary, nor in ancient time the pope, could take away from the patron, nor alter without his will and assent. And therefore in all appropriations the patron is a party, for he ought to accept it; and the ordinary is the agent, and the patron is the patient, and his assent in submitting himself to the will of the ordinary, and in accepting his order, and in executing that which he ordains, is a declaration of his will, and the whole shall be intended to be done at his request, for the benefice is his own. So that the ordinary and the patron are two actors in this drama.

But besides these there is a third who has a part to act herein, and that is, the king, as king, for he might be hurt by this marriage or appropriation, because the advowson is held of him mediately or immediately. And if it is held of him immediately, then

all possibility of having any advantage of wardship, relief, or the like, accruing from the tenure, is taken away by this conjunction; for then it cannot be expected that the patronage will ever come again into lay-hands, or that the king, who had the patronage, if he was the founder of the abbey, priory, or other spiritual place, shall in any mean vacation have the presentment. And if the advowson is held immediately of a subject, yet it is held mediately of the king, for all lands within this realm are held either mediately or immediately of the king, and before the church was built the land upon which it stands was held of the king, and so shall the advowson be held of him, which is reposed in the patron in lieu of the land upon which the church is built, and this patronage may possibly come to the king by escheat or otherwise, and if it does not, yet the king may have the benefit of it by lapse. For if the patron does not present within six months, then the ordinary may present within the next six months, because it is his duty to see that the parishioners have divine service performed; and if he does not present within these six months, then the metropolitan may present within six months next after, in respect that it lies upon him to see that the parishioners have divine service; if the ordinary is remiss in providing it, and if the metropolitan does not present within these six months, then the king may present when he pleases, for in respect that the land is held of him, the presentment accrues to him by lapse, for default of the other three, as supreme patron (as *Dyer* called him, and *Harper* and the other justices called him supreme patron as king, and not in respect of the supreme jurisdiction which the realm had acknowledged in him by the statute, with reference to that which was before exercised by the pope). And all this benefit which might accrue to the king from the advowson is lost by the appropriation, because it will never come out of the hands of the incumbent again, so that the king can never have any hopes of presenting an incumbent by lapse or otherwise. And therefore in respect of the loss which the king sustains by an appropriation, the law has given him a prerogative that he shall be privy and shall give his consent to every appropriation, as well where the church is of the patronage of another, as where it is of his own patronage. So that the king is the third actor in this drama.

[But *quære*, if the appropriation be made without the king's assent, what damage the parson imparsoned shall sustain by it. For the appropriation is not mortmain, as it appears in 21 *Ed.* 3. 5.

Where an
advowson
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1576.

Diversity between an appointment of a perpetual incumbent (by way of appropriation) by the ordinary with the assent of the patron and of the king, when the church is full, and the presentation of an incumbent by the patron when the church is full.

An appropriation made when the church is full is not precisely a grant of the glebe and tithes, but an appointment of a spiritual body to be incumbent when the present incumbent

the patron, nor the ordinary, nor the king, have any estate in the parsonage, but the whole estate and inheritance thereof is in the incumbent, and therefore neither the patron, nor the ordinary, nor the king, have any thing to do with it in the life of the incumbent: but the matter rests upon another point, for although they have nothing to do with the parsonage, yet the ordinary, inferior, or superior, may, with the assent of the patron and of the king, assign the patron, being a spiritual body, to be incumbent when the present incumbent shall be dead, or an avoidance happens. And in this case there is a diversity between the presentation of an incumbent by the patron, and this assignation of an incumbent by the ordinary. For while the church is full, the patron cannot present one to the bishop to be incumbent when the church shall be void, but he ought to wait until the church is void, and before the avoidance happens, he has no title to present, nor is the ordinary bound to accept the person presented to be parson at a time to come, but such presentation shall be void. But the ordinary, with the assent of the patron and of the king, may assign the patron, being a spiritual body, to be incumbent when the present incumbent shall die, or an avoidance happen, for this is prejudicial to none, and the person assigned may be so fit for it that it may be beneficial to the church and to religion. And upon this reason the pope, before he was prohibited by the act of 25 *Ed.* 3. used to make provisions to the benefices of other patrons, and especially to the benefices which the clergy had, which, although injurious to the patrons, yet such provision as to incumbents was undoubtedly allowed in the law as good, and such provision was nothing more than a designation of one to be an incumbent after the present incumbent should be dead, or an avoidance should happen, and that such person assigned might enter into the rectory, and retain the profits during his life without admission, institution, and induction. And if the pope could do so in such case where it was injurious to the patron, and the clerk so appointed was, after the death of the incumbent, adjudged in law a sufficient incumbent, without admission, institution, or induction; *a fortiori*, he might have done this to the patron himself, in which case no injury would have been done to the patron, and such patron should have been adjudged incumbent without any other admission or institution, and might have entered without induction. And if the pope used to do this, then the king, in whom such power as the pope exercised is acknowledged by parliament to be, may do it; and then if

the

C A S E S.

l. 3. above cited, where, upon *Wilby's* saying that if the advowson had been held of the king, and it had been appropriated without his license, although another had been the founder, the king might have seized the advowson, and yet it was a damage to one; to that *Shard* replied, "What you say is the king's prerogative, and has always been adjudged as well touching advowsons which are not held of him, as touching those which are held of him, for he who appropriates a church ought to have the king's consent; but if the king in such case seizes the advowson, it is not forfeited, but he shall present to the avoidances in the name of himself, until a fine be made to him for making the appropriation without license." These are the words of *Shard*, which I thought proper to cite at large, and the more so because I did not hear the judges speak to this matter.]

And so all the justices unanimously agreed, that the ordinary inferior or superior, the patron, and the king, ought to assent to every appropriation.

As to the third point, *viz.* at what time an appropriation may be made, that is, if it may be made when the church is full: as to this, all the justices unanimously agreed that an appropriation may be made by apt words when a church is full, that is to say, by words which serve to appropriate it afterwards when it shall be void. For the most proper time to make an appropriation is, when the church is void, because then the appropriation may be executed presently. But if the church is full, then if proper words are used; as, that the patron, who is a spiritual person, after the church shall be void, shall be parson, and may retain the glebe and the fruits to his own proper use; this shall make a good appropriation when the present incumbent is dead, or an avoidance happens. So that the effect of the words shall be there executed afterwards when the church is void. And the reason whereupon we have heretofore doubted of this, is, because the present incumbent has a fee-simple in the mansion, and in the glebe, and in the tithes, and there is no reversion or interest in any other besides the incumbent, when there is an incumbent. In which case it has been said, that the ordinary, and the patron, and the king, cannot grant to a stranger that he shall retain in time to come the glebe and tithes, in which they have then no estate or interest, but which another is seised of in fee, and that they cannot unite, annex, or consolidate to the patron and his successors the rectory which they have no estate. But as to this, true it is that neither

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sentment, institution, and induction; and then there cannot be two incumbents of one and the same church at one and the same time, for to be incumbent is the office of one body; and if there is one incumbent, and another is presented, admitted, instituted, and inducted, all this is void. As, if *A.* is an officer of an office for life, as steward of a manor, or the like, a patent made to *B.* of the same office during the life of *A.* is void, and if *B.* is admitted, instituted, and inducted, *A.* shall have an action of trespass against him. So, if a parson imparsonnee has a church appropriated to him, and another is presented, instituted, and inducted into the same church, he shall have an action of trespass against him, if he meddles with the glebe and tithes, as it is agreed by all the justices in 38 *H.* 6. And the like case was cited in 39 *H.* 6. where a prior was parson imparsonnee, and a stranger presented his clerk, who was admitted, instituted, and inducted, and in by six months, and made a lease of the parsonage, and the lessee ousted the prior, and the prior brought an action of trespass, and the matter was there well debated, and it was the opinion of the whole court that the action of the prior was maintainable; for when the church was full of the prior, the presentation, institution, and induction of the other did not oust the prior, but was void, because the prior shall be adjudged always in possession, and therefore he could not have had a writ of right of advowson, for none shall have that writ but he who is out of possession, for which reason his action of trespass or assize should lie. But a parson imparsonnee cannot, in a *quarr impedit* brought against him, plead plenarty (as *Manwood* said), because the statute of *Westminster* 2. cap. 5. gives such plea to the patron, *viz.* that the church is full of his own presentation by six months before the writ purchased, which a parson imparsonnee cannot say; and that statute destroys the pleading of plenarty at the common law, which was, that the church was full the day of the writ purchased, as it is said in the said case of 38 *H.* 6. wherefore a usurpation cannot be made upon a parson imparsonnee, nor can the church be disappropriated by such means.

But, if a parson imparsonnee presents another, thereby he has disappropriated the advowson, and made it presentable ever after, as *Manwood* said; for, he said, *volenti non fit injuria*, but against his will no one can tortiously disappropriate it. And if a corporation, to which a church is appropriated, is dissolved, the church is thereby disappropriated, (as the lord *Dyer* said), and the lord of whom the advowson is held may present to it.

[*Quere*, If dean and chapter, or other spiritual corporation, is seised of a manor to which an advowson is appendant, and the church is appropriated to them, and afterwards they make a feoffment or a lease of the manor *cum pertinentiis*, shall this disappropriate the church? For it seems to some, that by the course of the common law the advowson shall pass as appendant to the manor; but now by the statutes, which have made the king and lay persons capable of parsonages appropriate, the advowson is in such case severed from the manor by the intent of the acts, and in the grant of the parsonage appropriate, which may now be granted and transferred to common persons, the advowson shall pass.]

1576.

So it was held by all the justices that no usurpation can be made upon a parson imparsoned, as it is said before.

And as to the last point, *viz.* if there are all the necessary ingredients in the appropriation here pleaded. And the three *puisne* judges, *viz.* *Mounson*, *Manwood*, and *Harper*, held that there were, and that the words of the charter of king *Edward* 6, are sufficient to convey the advowson to the dean and chapter, and to make the appropriation, and that the said king's charter serves for three purposes, *viz.* to convey the advowson to the dean and chapter, and to make the appropriation as supreme ordinary with his ecclesiastical jurisdiction, and also to give his assent as king of this realm, and that the church was full of the dean and chapter immediately after the death of *Haltman*, and that the presentation, institution, and induction of *Chamberlain* was void, and that upon the whole matter the plaintiff ought to be barred. But as to the lord *Dyer*, altho' he agreed with them in the first four points, yet in this last he varied from them, and he took four exceptions to the matter and the form contained in the bar.

5th Point.

If there is every thing requisite to make the appropriation here good.

The first was, because in the grant of the advowson to the dean and chapter, and to their successors, there is not the clause of *non obstante* the statutes of mortmain; for the king's grant ought not to be taken to two intents, *viz.* to convey the advowson to the corporation, and also to dispense with the statutes of mortmain. And hereupon he cited the case in 9 *Ed.* 4. in an assize between *Ragot* and *Swiringdon*, where the king granted an office for life to an alien; and it was there taken that the grant was not good, because no mention was made in the charter that the grantee was an alien, and forasmuch as the grant could not enure to two intents, *viz.* to make him a denizen, and also to convey to him the office, the charter was held to be void; wherefore the party, in

Exceptions taken by *Dyer* C. J. to the matter of the bar.

1576.

order to enable himself to have the office, shewed the letters of naturalization.

Exception 2.

The second exception was, that the charter is not sufficient to make an appropriation, because it has not made the dean and chapter parsons of the church. And the charter ought to have granted, that after the avoidance of the present incumbent they should be parsons, for the words of uniting and incorporating the parsonage to them and to their successors, and of enabling them to enter into the parsonage, extend only to the rectory in which the king and patron had nothing, and therefore he had no authority over it, and consequently the grant is void for that reason. But the effectual words to make the appropriation in this case are words which constitute them parsons after the avoidance of the present incumbent, which words are omitted. For if a writ of annuity had been brought by the dean and chapter, after the death of the then present incumbent, for an annuity due in respect of the parsonage, or if a writ of annuity had been brought against them for an annuity which was payable for the parsonage, in both these cases they ought to have been named parsons. And this appears in the first case in 21 H. 7. as well as in divers other books which he cited. And he also cited the case in 12 H. 4. in an assize, where the prior of *Burton* brought an assize for certain wheat taken, &c. and the tenant pleaded *out of his fee*, &c. and the plaintiff said that he and all his predecessors, parsons of the church of *Pederton*, had been seised from time immemorial, &c. and it was the opinion of the justices that the writ should abate, because he was parson, and claimed as parson, and was not named parson. And he cited divers other cases to the same effect. So that, he said, to be parson is the chief point of an appropriation, and therefore the want of words to make them so here renders the appropriation insufficient.

Exception 3.

The third exception was, for that the defendants have not alleged that they entered after the death of *Haltman*. For the words of the charter are, that after the avoidance *they should and might hold*, &c. in which case power and liberty is given them to hold, and they have not shewn that they did enter or hold, for in things of election the party ought to shew that he has done it. And because the defendants have not alleged an entry, the appropriation is not shewn to be executed, and therefore the plea in bar is insufficient.

Exception 4.

The fourth exception was, for that the defendants have pleaded that after the death of *Haltman* they were parsons, and held and yet

yet do hold the aforefaid rectory and church to their own uses, and thereof then and always afterwards have been seised in right of their cathedral church aforefaid; whereas they ought to have said, *in right of the church of Dean*, for they hold the parsonage in right of the church of *Dean*, and not in right of the cathedral church of *Worcester*, as it is shewn before; so that this is not well pleaded, but vitiates the plea.

But the lord *Dyer* was the last who argued, and there was none to reply to him as to these exceptions; and therefore one of the defendant's counsel, who heard the exceptions, put in writing such answer to them as occurred to him, and delivered it to the lord *Dyer*, which was also seen by the other justices. And the answer was thus, *viz.* as to the first exception, touching a *non obstante* the statutes of mortmain, the grant is good notwithstanding there is not any license to alien in mortmain, nor any clause of *non obstante* in the patent, and that as well in the case of a grant by the king as by a common person, and it shall vest in the grantees, else it would not be mortmain. But the penalty is, that the lord immediate may enter within the year, and the other lords within half a year after the time devolves to them, and (if the thing does not lie in tenure) the king shall have it after office found, and until office is found it is in the corporation. And so in this case if the clause of *non obstante* was necessary, the king might have a *scire facias* after office found, and by that means he might re seize the advowson. But the grant was a grant and passed at one time, so that the patent is not void. And if in fact the dean and chapter had a sealed license of the king to purchase this advowson of the king, this license and the grant afterwards by another charter were good, notwithstanding there was no clause of *non obstante* in the charter of the grant of the advowson; and there might be such license in this case, and it is not necessary to plead the license upon the grant, but when the party is empleaded by *scire facias* after office finding the mortmain, then is the time to shew it. And in *Fitzherbert, tit. Fines*, we may frequently see fines levied to corporations without shewing any license; but if after the fine the corporation is impeached for the mortmain, then is the time to shew the license, and not in pleading or in setting forth the title. And in *rei veritate* there is a clause of *non obstante* in the patent here, although it is not pleaded.

And it seems that though the dean and chapter had not had any license to purchase this in mortmain, nor any clause of *non obstante* in the patent, yet the patent should have been good, for it cannot

Answer to the 1st exception taken by *Dyer C. J.*

The king may dispense with the statutes of mortmain without any clause of *non obstante*.

1576.

be presumed that the king is ignorant of his law, because he is the head of it; and therefore when he granted the advowson here, and said, *of his certain knowlege, &c.* it is to be supposed that he was desirous that the defendants should have the advowson, notwithstanding his statute of mortmain, whereof it is to be intended that he takes cognizance by the words, *of his certain knowledge, &c.* so that the grant countervails in itself a grant and a clause of *non obstante*.

And where it is said by the lord *Dyer*, that the king's grant cannot enure to two intents, true it is, where the one intent is to be taken of a foreign matter; as, if the king grants land to *A.* and his heirs, and *A.* is his villain, this grant shall not enure to give the land to the villain, and also to manumise him, because his being the king's villain was a foreign matter, and in fact not apparent to the king; but yet the patent is good to the villain, and the land is vested in him, though upon an office finding that he is a villain, the king may enter into the land as well as if any other had given it to his villain; and in this case the land passed from the king, although the patent did not manumise the villain. But in the principal case there is no such foreign matter in deed not apparent to the king, which the king might be said not to have cognizance of, for the king was well apprised that the dean and chapter were a corporation, and that his statute of mortmain extended to them, which statute he could not be ignorant of, but on the contrary he had knowledge of it, as his words, *of his certain knowledge*, testify. So that here there is no ignorance in fact, as in the cases of a villain, and of an alien; but if there is any ignorance at all, it is an ignorance in law, which cannot be allowed in the king in this case.

Yet in some cases it is necessary to have the clause of *non obstante* in the king's grants. As in the case of *2 H. 7. Fitz. tit. Grant, pl. 33.* it was ordained by statute that the grant of the king to any one to be sheriff of any county for a greater time than one year should be void, notwithstanding the clause of *non obstante* should be in the patent; and there it was taken that the grant of the king made to the earl of *Northumberland* to be sheriff during his life ought to have a clause of *non obstante, &c.* because the statute is strictly penned *ut supra*, and the patent made to the earl in that case was good with the clause of *non obstante, &c.* So, if the king will grant to one to be escheator for life, there ought to be the clause of *non obstante*, because the statute has precise words to
make

make void such grants. And in a pardon of murder, if the king expresses that the party shall not find surety for his good behaviour, as the statute of 10 Ed. 3. requires, there ought to be a clause of *non obstante, &c.* in the charter, because the statute expressly makes such pardon void, if such surety is not found afterwards. So that to avoid the precise words of the act, it is necessary to have the clause of *non obstante, &c.* But in the statute of mortmain there are no precise words to make the grant void, but the act gives an entry or seizure, as the case requires, always admitting the grant to be good. And here it appears to be the intent of the king that the dean and chapter should enjoy this without seizure, as it is said before; and the words, *of his certain knowledge*, shew that he took upon himself cognisance of all things requisite, and, consequently, of the statute of mortmain.

As to the second exception, *viz.* that the charter has not expressly made them parsons; to this the said counsel wrote an answer, that the words which enable the dean and chapter to hold to their own use, without presentation, admission, or induction, and the words of the grant by which the king appropriates, consolidates, unites, and incorporates the church and the rectory to the dean and chapter and to their successors, import that they shall be perpetual parsons, and in a manner make them parsons, and are equivalent to words which make them parsons, and are usual in appropriations without other words to make them parsons, as appeared by the precedents shewn to the lord *Dyer* with that which is here written. And these words together with the words, *of his special grace, and mere motion, &c.* are to be so applied that something shall be made of them rather than they shall be void. And the king's intent ought not to be utterly subverted.

Answer to the 2d exception. These words by periphrasis amount to the same as if they were expressly made parsons.

As to the third exception, *viz.* that the defendants have not shewn that they entered after the death of the incumbent; to this the said counsel wrote in answer, that the patent made the dean and chapter parsons immediately after the death of *Haltman*, without presentation, admission, and institution, and then if the words shall take such effect, the grant is as fully executed as if all these three things were executed in a common incumbent, and especially as to the admission and institution, by which words they were made fully parsons, and had the spiritual function at the instant of the incumbent's death, and the cure of souls. And as to the induction which gives seisin of the possessions, that was dispensed with by the patent; wherefore the dean and chapter are in the same case as they

Answer to the 3d exception.

1576.

they should be by admission, institution, and induction. And though it should be admitted that the words of dispensing with induction are not equivalent to an induction which gains the seisin, yet the words of the plea in bar are, that after the death of the incumbent *the aforesaid dean and chapter were parsons of the same church, and the aforesaid rectory and church to their own proper uses held and yet hold, and thereof then immediately and always afterwards have been and yet are seised in their demesne as of fee*; which words (*that they were seised*) imply an entry, for without entry they could not be seised, and it is not the practice in the common bench in like cases of possessions executory to allege an entry. For upon a fine *sur grant et render* the pleading is, *by force whereof he* (the party to whom the render was made) *was seised*, without saying that he entered and was seised. And in an *ejectione firmæ* the plaintiff usually shews the lease made, and says, *by force whereof he was possessed*, and does not shew any entry; and it is good, because a man cannot be seised or possessed of land unless he first enters; and therefore when he shews the seisin, it is as much as if he had said, that he entered and was possessed or seised. And so it shall be in the principal case here.

Answer to
the 4th ex-
ception.

As to the fourth exception, *viz.* that the defendants have said that they were seised in right of their cathedral church; to this the said counsel wrote in answer, that the plea is, that after the death of *Haltman* they were seised of the rectory and church of *Dean*, in their demesne as of fee, *in right of their cathedral church aforesaid, &c.* which is true, and well pleaded. For there is a difference when the plea is of the whole, and when of parcel. For if they were disseised of an acre parcel of the parsonage, there, if they said that they entered and were thereof seised, they ought to say, *in right of their church of Dean*. And so in the *Register* in a *juris utrum* brought by *L. bishop of Lincoln* parson of the church of *E.* the words of the writ are, *whether 20 acres of land with the appurtenances in E. are frank-almoign belonging to the church of the said L. or lay-fee, &c.* So in 49 *H. 6.* 16. where the abbot of *Colchester*, parson of a church, claimed an annuity which was belonging to the said rectory, it was taken that he ought to prescribe in right of the rectory, and not that he and his predecessors abbots have had it from time immemorial; for of parcels and things belonging to the rectory, they ought to be claimed in right of the rectory. But here the parsonage and church of *Dean* is an entire thing, of which entirely the dean and chapter have alleged that they

they were seised in right of their cathedral church ; and so in truth they are, and it would be very absurd for them to say that they were seised of the church of *Dean* in right of the church of *Dean*, or of the rectory and church of *Dean* in right of the church of *Dean*. Wherefore there is an apparent diversity between the cases. 1576.

Besides, if the words *in right of their cathedral church aforesaid*, &c. had been totally omitted, the plea would not have been bad ; and then the misrecital of that which might have been wholly omitted cannot vitiate the plea.

And afterwards judgment was given for the defendants, and against the plaintiff.

See N. Bendl. 296. S. C. says that no

judgment was here given, but that the parties compromised the matter upon the payment of a sum of money awarded to the plaintiff.

P. 23 Eliz. A. D. 1581. In Cam. Scac.

Fleming, and the Tenants of *Dudley*. [Sav. 13.]

IT was holden between *Fleming* and the tenants of *Dudley*, that if the tenants, from time whereof memory does not run, &c. have been used to pay a certain price for a tithe lamb, so that the custom is fully established, that although afterwards the parson encroaches upon more, or the tenant pays the lamb in kind, this does not destroy the custom. But, if one had paid a penny for a lamb for fifty years ; and afterwards pays tithe in kind, before the custom is established ; although he again pays his penny for twenty years, they cannot prescribe in *modo decimandi*. When you may or may not prescribe in modo decimandi.

T. 24 Eliz. A. D. 1582. In Cam. Scac.

Mayne against *Becke*. [Sav. 30.]

ONE *Mayne* sued *Becke* in the spiritual court for tithes of the manor of *B.* in the county of *Bucks* ; and *Becke* exhibited an *English* bill, setting forth, that he was tenant for years on the demise of the queen, and alleged that the said manor was discharged from tithes, and prayed a prohibition, which was granted ; and afterwards the same *Mayne* came, and prayed sequestration of the tithes of the said manor. Sequestration to set out tithes never seen.

Manwood.

1582.

Manwood. Had the contention been between the parties to whom the tithes of the manor, severed from the ninth part, belonged, your request had been reasonable; but to grant a sequestration for the setting out of the tithes, was never hitherto seen; and if the defendant agrees to this, he admits that the lands are titheable. *Shute* agreed.

T. 26 Eliz. A. D. 1584. In Scac.

[Sav. 60.]

Where the parish is not certainly known, and where there has been no usage of payment, the tithes shall be paid to the parson, or vicar, of the parish where the owner resides.

THERE is a fen called *Wildmore*, in the county of *Lincoln*, which fen is not known to lie in any particular parish; whereupon it was ordered in this court, that the tithes in this case should be paid to the parson, vicar, pensionary, &c. where the owner of the cattle lives. But, if the tithes have been paid to the parson of any parish, beyond time of memory, although it be not known in which parish the moor or common is, they shall be continued to be paid in the said parish, where they have been used to be paid; but where no usage of payment hath been heretofore, nor the parish certainly known, they shall be paid to the parson or vicar where the owner resides, by virtue of a proviso in the statute passed in 2 & 3 *Edw. 6.* chap. 13.

M. 27 & 28 Eliz. A. D. 1585. C. B.

Branche's Case. [Moore 219.]

Unity of possession by a religious person of the manor and parsonage, is no discharge for the copyholders.

A Prohibition was granted out of the common pleas against the ordinary of *Gloucester* and one *Branche*. The surmise was, that the land from which the tithes are demanded, is copyhold, parcel of a manor whereof a prior was seised in fee, and was also parson imparsonnee, by which union the tithes are extinguished. And *Snag* serjeant moved, that the surmise was not good, for the union was no discharge of the tithes of the copyholders, and therefore he prayed a consultation, and had it. For the court said, that there is no prescription alleged in the surmise to be discharged of tithes: and in truth, if an abbot or prior be seised of land discharged of tithes, the new farmer of that land shall be admitted to prescribe in a *non decimando*, by the statute of 2 *E. 6.* which wills that no one shall pay tithes otherwise than they were paid forty years before: but in no other case shall a man prescribe in *non decimando*, but only in *modo decimandi*.

M. 29 & 30 Eliz. A. D. 1587. B. R.

Savell v. Wood. [Cro. Eliz. 71.]

PROHIBITION against a parson who sued for tithes in the spiritual court: the defendant surmised that the clerk of the said parish, and all his predecessors assistants to the minister there *divina celebranti*, had used to have five shillings of him, &c. for the tithes of the place, where, &c. *Coke* said this prescription is void; for it is in one person onely that hath no perpetuity, but is dative and removable, 32 H. 6. 5. And if it be a good surmise, yet there is no cause but a consultation shall be awarded, for it is to come in question in the spiritual court, whether the parson or the clerk hath right to the tithe. And he said it was lately adjudged in *Busb* and *Hunt's* case, where the vicar sued for tithes, and a prohibition was prayed upon surmise that he had used time out of mind to pay the tithes to the parson, that it was not a sufficient surmise for a prohibition to entitle another to the tithes, for that shall come in question in the court christian. *Note*, Afterwards *Hill*. 30 Eliz. it was moved again by *Gawdy* and *Fleetwood* serjeants for the plaintiff, that it was a good prescription, because the parsonage was a parsonage impropriate, and by intendment it commenced by the act of the parson, viz. that he made a composition that the tithe of that land should be paid to the clerk in discharge of himself, and that he had used time out of mind, &c. to pay to the clerk five shillings in discharge of all tithes, &c. And the court said, if this special matter be shewn in the surmise, perhaps it might be good by reason of the continuance, and that by this the parson is discharged from finding the clerk, with which *peradventure* he shall be charged, and so is as a payment of tithes to the parson himself; but such matter is not shewn, and by common intendment tithes are not to be paid to the parish clerk, and he is no party in whom a prescription can be alleged. And thereupon they awarded a consultation.

Payment of money to a parish clerk time out of minde, no good plea in discharge of tithes.

Moore 908.
1 Leon. 94.
S. C.

P. 30 Eliz. A. D. 1588. B. R.

Stebbs v. Goodluck. [Moore 913.]

Fraud upon a customary payment is remediable at common law, and is no ground for a demand of tithes in kind in the spiritual court.

IN the queen's bench, between *Stebbs* and *Goodluck*, parson of *Littlecombe*, in the county of *Berks*, a custom was alleged, that the parson was to have every tenth land for the tithe of corn, beginning from such land as is next the church: whereupon the occupiers of the land knowing beforehand what land would be the parson's, by covin and in order to defraud him, did not till, nor sow, nor manure his land, as they did their own: by reason of which covin the parson sued in the spiritual court for tithes in kind, that is, the tenth cock of all the corn. And a prohibition was awarded notwithstanding the covin, because the fraud is remediable in an action upon the case at common law.

Tr. 30 Eliz. A. D. 1588. In Cam. Scac.

Grymes and others, v. Smith. [12 Co. 4.]

Endowment is to be presumed when a vicarage hath long continuance.

THE case was as follows: The abbot of *Sally* held the parsonage of *Lubbenham*, in the county of *Leicester*, appropriate, which, as a parsonage impropriate, came to king *H. 8.* by the dissolution of monasteries, *anno* 31 *H. 8.* who, in the 37th year of his reign, granted it in fee farm, under which grant the plaintiff claims: the defendant had obtained a presentation of the queen, and, to destroy the said impropriation, shewed the original instrument of it, *anno* 22 *Ed. 4.* with condition that a vicarage should be competently endowed, and alleged, that such vicarage was never endowed, and that, for that very cause, the impropriation was void. In truth, there was no instrument, nor direct proof of any endowment of the vicarage. But as the said rectory was, during all the time of the impropriation, supposed, reputed, and taken to be appropriate; and by all that time a vicar had been presented, admitted, instituted, and inducted, as a vicar rightfully endowed, and had paid his first fruits and tenths; it was resolved, that it shall be presumed in respect of continuance, that the vicarage was lawfully endowed, for that *omnis presumatur solemniter esse acta*. And it would be a dangerous precedent to examine the originals of impropriations of any parsonages,

sonages, and the endowments of vicarages, for that the originals of them in time will perish. And so it was decreed for the plaintiff. 1588.

[As this is a leading case upon this point, I have subjoined the original decree from the record in the exchequer.]

20 June, 30 Eliz. Upon hearing the matter between *Thomas Grymes* and *Jane Grymes*, widow, plaintiffs, and *Henry Smith*, defendant, being for and concerning the right and possession of the parsonage of *Lubbenham*, in the county of *Leicester*, it was affirmed by the plaintiffs, that the said rectory and parsonage was lawfully appropriated to the abbot of *Sulbey*, in the county of *Northampton*, of which the said abbot, long time before the dissolution thereof, was seised in his demesne as of fee in the right of his monastery, and had the same in proper use till the dissolution of the monastery; by force whereof, and the statute for dissolution of monasteries, made in the 31st year of the reign of the late king *Henry* the 8th, the same came to the hands and possession of the said late king; who being thereof seised, and holding the same in proper use, granted the same, in the 37th year of his reign, to one *Richard Grymes* and his heirs, to hold of him, his heirs and successors, by knight's service *in capite*, and by the rent of 37*s.* a year; and that by divers mesne conveyances, two parts of the said rectory were assured unto one *Thomas Grymes*, father of the said *Thomas*, one of the now complainants, and to the heirs of his body lawfully begotten: and a third part thereof to the said *Thomas*, the father, and the said *Jane*, one other of the complainants, and the heirs of the body of the said *Thomas* the father; and that the said *Thomas* the father died seised thereof, and the said *Jane* survived, and by force thereof the said *Jane* and *Thomas*, the now plaintiffs, were seised of the said rectory, viz. the said *Thomas* the son, being within age, and yet in ward to the queen's highness, of two parts of the said rectory, and the said *Jane* of a third part thereof, with divers remainders over as is aforesaid: and the said defendant having pretended that the said rectory was presentable by her majesty, and upon such suggestion thereof to her highness, of late having obtained from her highness, under the great seal of *England*, a presentation to the said rectory, hath frequently sought before this time, and yet doth, to be admitted, instituted, and inducted into the same; whereupon the state of the cause in question appearing to the court to depend on this fact, whether the said rectory were lawfully

1588.

lawfully appropriate, or elsewhere presentable, the said plaintiffs' counsel shewed forth to the court an instrument of appropriation of the said rectory of *Lubbenham*, establishing a perpetual vicar there, made in the 22d year of the reign of kind *Edward* the 4th, against which the said defendant's counsel took exceptions; for that in the said king's licence of appropriation of the said rectories mentioned within the said instrument, there was a proviso and condition for a vicarage there to be competently and sufficiently endowed, according to the statute in that case provided, and said, that the vicarage was never endowed, and therefore the appropriation, as they thought, was void; upon which matter the defendant, having the presentation aforesaid, grounded his title: but for that it was confessed by each party, that the said rectory and parsonage of *Lubbenham* hath continually, from the said appropriation, been allowed, reputed, taken, and used as a rectory and parsonage appropriated; and also, that there had been a vicar, ever since from time to time, presented, and canonically admitted and inducted, to be perpetually there residentiary; and that ever since the same hath been a vicar resident, maintained and sustained to this day as a vicar endowed; and that from the time that the first fruits and tenths of all parsonages and vicarages were granted to the said late king *Henry* the 8th, and to his heirs and successors, the said vicarage of *Lubbenham* hath been charged to the payment of the first fruits and tenths unto this day, as all other vicarages endowed have been, as by the certificates and records remaining in the office of the first fruits and tenths, and by the accounts of her highness revenues of the said county of *Leicester* doth and may appear: the court was fully satisfied, that the said vicarage of *Lubbenham* was lawfully endowed, and that the said rectory was lawfully and perfectly appropriated, and the condition in the said letters patent mentioned sufficiently performed. In consideration whereof, and for that also it seemed to the court, that it would be a very dangerous precedent to draw in question or examination the original instruments and grants of appropriations of parsonages, and donations of vicarages, in that there be very few within the realm whose originals and beginnings can now be certainly shewed by reason of the long continuance of time past; and for that also many of the same original instruments never came to the king's hands; and for many other causes; it is ordered and decreed, that the plaintiffs shall enjoy the said rectory and parsonage of *Lubbenham*, according to their several estates and interests contained in their

their said bill ; and that the fee-farm rent hitherto reserved and paid to the queen's highness, and the said tenure by knight's service *in capite*, shall be continued to the queen's highness, her heirs and successors, for ever ; and that all suits brought by the defendant touching the same shall surcease and be stayed, and no farther prosecuted ; and that the said defendant shall not in anywise farther trouble, vex, or molest, the said plaintiffs, their heirs or assigns, by colour of the said presentation ; nor at any time hereafter make title or claim to the same rectory, by force of the same presentation : and likewise it is ordered and decreed, that the bishop of *Lincoln*, within whose diocese the said rectory is, shall be restrained for ever to admit, institute, or induct, the said defendant to the said rectory, by force of the said presentation ; and the injunction, before this time in the said bishop awarded in this behalf, to be continued ; and if the said defendant hath compounded for the first fruits of the said parsonage, then it is ordered and decreed, that he shall be discharged of the sums compounded for to be paid for the same.

1588.

Tr. 30 Eliz. A. D. 1588. In B. R.

Collins v. Vaughan. [Cro. Eliz. 100.]

AN information was preferred by the plaintiff for the queen and himself against the defendant, vicar of the church of *Engliscombe* in the county of *Somerset*, for that the defendant *absentavit se*, and had not been resident on his benefice for a whole month together. After verdict *Walmesley* moved in arrest of judgement, that the information was insufficient ; for the statute is, if he absents himself *voluntariè*, which is not alleged ; and if he be absent by compulsion or restraint, it is out of the statute. And of that opinion was the whole court, that the word *voluntariè* is of force, and must be in of necessity.

An information upon the statute of 21 H. 8. c. 13. for non-residence, must allege that the defendant absented himself *willfully*.

M. 31 & 32 Eliz. A. D. 1589.

Parkins v. Hinde. [Cro. Eliz. 161.]

IN prohibition for suing for tithes of land in *Babington*, the case was as follows. The parson of *Babington*, 29 H. 8. leased all his glebe and to *Mills* for ninety-nine years, rendering thirteen shillings fourpence of rent, for all exactions and demands. And now his successor

Exactions and demands in a lease of glebe does not include tithes.

1589.

cessor sued for tithes of the land, being the glebe land, and upon it the plaintiff sued a prohibition. *Godfrey* moved, that the prohibition lieth, because the land was let rendring rent, and it is for all exactions and demands; and by that the parson bars himself and successors of all tithes. But all the justices *contra*; for *Wray* said, the parson shall have tithes against his lessee, and the words here shall be no discharge; for these tithes arise and accrue after, and are not things issuing out of the land, but collateral and due *jure divino*; and therefore cannot be discharged but by special words: but, if the words had been, as well for tithes growing and arising upon the land, as for other demands, then peradventure it had been a good discharge. But as the case is, it cannot be intended by any words, that he reserved the rent for tithes. And so *Gawdy* justice conceived, especially as the case here is, the lease being of twenty-four acres of land, and only thirteen shillings four-pence reserved. And afterwards, the same day, they granted a consultation, but they said, that the words shall discharge the lessee of all rents and services, but not of suit at court, or such things as were not then in demand.

M. 32 & 33 Eliz. A. D. 1590.

Nash v. Molins. [Cro. Eliz. 206.]

Spiritual persons may prescribe in non decimando for tithes, and the patentee, by 31 H. 8. 13. shall enjoy the privilege.

1 Leon. 240. S. C.

IN prohibition for suing for tithes in *Bocking Park* in *Essex*, the plaintiff surmised, that the lands were parcel of the possessions of the priory of *Christ's Church* in *Canterbury*; and that the prior and his predecessors had held them discharged of tithes *tempore dissolutionis*, and pleaded the statute of 31 Hen. 8. The defendant pleads, that the prior and his predecessors did not hold them discharged; and upon this issue was joined, and being tried at bar, it appeared, upon the evidence, (a) that the prior or his predecessors, time out of mind, &c. never paid tithes. But no cause of discharge was shewn, whether by unity of possession, real composition, or any other way. *Coke* said, it was no evidence; for it is a prescription in non decimando. *Curia contra*, for a spiritual man may prescribe in non decimando, and by the statute of 31 H. 8. the king shall hold

(a) The evidence was that of old persons who remembered the time of the monasteries, and that the lands in question did not pay tithes then or at any time afterwards. 1 Leon. 241.

discharged as the prior held it; and if he held it discharged *non* 1590.
esert by what means; for it shall be intended by lawful means:
and the jury afterwards found for the plaintiff.

Hil. 33 Eliz. A. D. 1590.

Wickham Bishop of Lincoln v. Cooper. [Cro. Eliz. 216.]

IN prohibition for suing for tithes, the plaintiff made suggestion that
he and all his predecessors, &c. were seised of the manor of which
the tithes were demanded; discharged of tithes during the time that
he was in their possession; and shewed that in the time of *Ed. 6.*
his manor was conveyed to the duke of *Somerſet*, and was after-
wards regranted and came to the bishoprick again. And *Fleming*
moved for a consultation; for that it was a prescription in *non deci-*
lando, which cannot be; and upon his own shewing the prescription
was interrupted, and cannot be revived. *Curia contra*, for the prescrip-
tion for a spiritual person is good; and the bishops of *Canterbury*
and *Winchester* use to prescribe so; and the prescription is not de-
termined when it came to the bishoprick again, for tithe is not a
thing issuing out of land; and unity of possession doth not extin-
guish it, nor a release of all the right to the land.

Land dis-
charged of
tithes when
regranted to
a bishop,
the prescrip-
tion revives.

1 Leon. 248,
S. C.

P. 34 Eliz. A. D. 1591.

Scory v. Baber.

PROHIBITION against the proprietor of the church of *South-*
kirby in the county of *York*, who sued for tithes of hay, and sur-
mised that time out of mind the owners of these lands had found
straw for the body of the church in discharge of all tithes of hay.
He moved, that this is no cause of discharge; for the parson was
not chargeable with it, nor had any benefit by it; and in *Hil.*
30 Eliz. it was ruled, that where one prescribed that he had used
to pay the parish clerk his wages in satisfaction of tithe hay, this
was no discharge, and of that opinion was the whole court: but, if
he had alleged that he gave the straw to the parson, and he be-
towed it in the body of the church, or that the parson had a seat
in the body of the church, it had been otherwise; and thereupon a
consultation was granted.

Finding
straw for the
body of the
church no
good modus
in discharge
of the par-
son's tithes.

Supra 157.

1592.

P. 34 Eliz. A. D. 1592.

Green v. Piper. [Cro. Eliz. 276.]

Houses in
London,
part of the
possessions
of one of
the greater
abbies, shall
pay tithes,
by 37 H. 8.
Moore 912.
S. C.

IT was held by the justices, that a house in *London* which was part of the possessions of a priory that was discharged of paying tithes of their possessions, yet by the statute of 37 H. 8. 2. shall be charged for tithes according to the ordinance there; for before that statute no dwelling house was chargeable for tithes, because no profit ariseth of it; and only noblemen's houses are excepted, and P. 35. it was adjudged accordingly, and a consultation was granted.

Hil. 35 Eliz. A. D. 1593.

Sherwood v. Winchcombe. [Cro. Eliz. 293.]

Tithes can-
not be parcel
of manor.

Infra.

IN prohibition, the plaintiff declared that whereas king H. 8. was seised of the manor of *D.* of which a portion of tithes of such a place was parcel time out of mind, &c. conveyed it to him, and he was empleaded in the court christian for these tithes, &c. and upon this declaration it was demurred; for tithes cannot be parcel of a manor, for they are things spiritual, for which at common law a common person cannot sue; and being of a distinct nature, cannot belong to a manor, 10 Ed. 3. 5. 9 H. 7. 46 Ed. 3. *catalla felonum* cannot be parcel of a manor, and although the king may have tithes, yet he hath them not as a lay fee. And of that opinion were all the judges, that he could not prescribe for tithes as parcel of a manor; but, if he had prescribed to have *decimam partem granorum*, this had been good, but not *portionem decimarum*, and a consultation was granted.

P. 36 Eliz. A. D. 1594. B. R. * MSS.

ONE *Rame*, parson of a church in *Essex*, libelled in the spiritual court for tithe of wood, *viz.* the branches of pollards, and alleged that they had used to be lopped for 14 or 15 years. And the defendants in the spiritual court brought a prohibition, and alleged, that the body of the trees whereof he libelled for the tithes was timber, and therefore tithes were not payable for the loppings. And so was the opinion of the court; for the body being privileged, that which proceeds from the body shall be privileged also, unless there be a usage to the contrary. For by *Popham C. J.* though tithes should be payable for the loppings, where the bodies are privileged, yet this must be by reason of usage; as, if a man lop a tree which is under twenty years old, and not timber at the time of the lopping; if, afterwards, this tree become timber, and be above twenty years old, and it be used to be lopped every 12 or 14 years, it shall pay tithes; but this is on account of the usage. And he said, there were but few trees in *England* of that nature.

No tithes are due for the loppings of trees, unless by usage.
Q. Whether this be not the same case with that of *Ram v. Patenson*.
Tr. 38 Eliz. Cro. Eliz. 477.
Moore 968. Goldb. 145. where the same point was ruled.
According to *Croke, Popham C. J.* was absent at the decision of that case.

M. 37 & 38 Eliz. A. D. 1595.

Gryfman v. Lewes, Parson of *Kingflund*. [Cro. Eliz. 446.]

IN prohibition for suing for tithes of cows, steers, oxen, horses, &c. wherein a custom was furnished, that every parishioner should pay for every milch cow one penny by the year, and for every other cow an halfpenny *per annum*, in recompence and discharge of all tithes of cows, oxen, steers, and calves; and also a penny for every mare, in discharge of all tithes of all horses, mares, and colts there; it was demurred, and a consultation prayed. For tithes paid for one thing, cannot be intended a recompence for tithes of another thing, where tithes are responsible for both in kind: and therefore it was adjudged in *fir Charles Morison's* case,

Payment of tithe for one thing cannot be a discharge of it for another.
Moore 454. S. C.

* This case is extracted from a manuscript book of reports which was obligingly communicated to me by Mr. *Hargrave*. The name of the author does not appear: but the book was given in 1618, by *Arthur Turnor*, to *Serjeant Calthorpe*, in exchange for other books. Mr. *Arthur Turnor* was called a serjeant in 12 *Cha.* 1.

1595.

Tithes payable for agistment of cattle.

where one prescribed to pay the tenth part of corn in the sheaf, for the tithes of all which is in the sheaf, and of all which is raked; that it was a void prescription, because he is to pay tithes of both of them. It is also unreasonable; for then he may put the less part in sheaves, and leave the greater part to be raked. And the opinion of *Fitz. N. B. 53.* that tithes shall not be paid for the agistment of cattle, is no law. And of that opinion was the whole court, that this prescription is not good to be discharged of one tithe by the payment of another: for he ought to pay somewhat for the tithe of every thing which is due. And if tithes should not be paid for the agistment of cattle, he might employ all his land in the feeding of barren cattle, and so defraud the parson of his tithes. And a special consultation was afterwards awarded *dummodo non agatur de decimis* for milch kine, draught oxen or beasts, agisted for provision for his house.

Hil. 38 Eliz. A. D. 1596.

[Anon. Moore 430.]

Fenny land drained shall pay tithes immediately.

NOTE. It was adjudged, that fenny land drained shall pay tithes, and that it is not within the statute for barren land to be discharged for seven years.

P. 38 Eliz. A. D. 1596.

Beddingfield v. Feak. [Cro. Eliz. 467.]

Saffron is a small tithe, and belongs to the vicar, though raised upon land which before produced corn, the tithe of which was paid to the rector.

Moore 909.
Owen 74.
Gouldsb.
149. S. C.

PROHIBITION: the case was as follows. In the village of *D.* in *Norfolk*, there hath been a parsonage, and vicarage to the church thereof, time whereof, &c. and the parsons have always had the great tithes, and the vicar the small tithes; and the parsons for forty years have had the tithes of such a field, viz. the corn: and it was now planted with saffron, and the vicar sued for the tithes thereof, and the parson sued a prohibition, and it was thereupon demurred. *Coke* moved, That it well lay; for by the statute of 2 Ed. 6. tithes shall be paid, as they had been paid for forty years before, which had always been to the parson; and although the land be now otherwise employed, yet the parson shall have the tithes thereof: and therefore it hath been adjudged here in the case of *Shipdam park*, in *Norfolk*, where 10s. was always paid for the tithes

tithes of all things *renovant* within the said park, and afterwarde the park was disparked, and converted into arable land; yet no other tithes should be paid but the 10s. *Popham*; it was otherwise ruled in the exchequer, in master *Wrotb's* case, for a park in the county of *Somerſet*. *Fenner*; The law is certainly, as it is cited in that judgement in this court. And the clerks ſaid, that they had divers precedents in court, according to the judgement cited. *Popham*; The difference is, when the preſcription is to pay money for all the tithes of ſuch a park, and there peradventure, if it be diſparked, he ſhall not pay any tithes; and where it is to pay the ſhoulder of every buck, or a doe, at *Chriſtmas*, for all tithes of the park; there, if it be diſparked, tithes ſhall be paid as of other land. And in the principal caſe he held, that the vicar ſhould have the tithes of ſaffron, as *minutæ decimæ*. For notwithstanding that tithes had been always paid for that land to the parſon, yet being converted to another nature and uſe, it ſhall be paid to the vicar, as if it had been converted into an orchard. So, if the vicar is to have all the hay, if the meadow be converted into arable, the parſon ſhall have it; ſo, a *converſo*. Wherefore a conſultation was awarded.

P. 38 Eliz. A. D. 1596.

* *Wright v. Wright*, Executor of *Wright*;

or,

The Biſhop of *Wincheſter's* Caſe.

IN a prohibition between *Robert Wright* plaintiff, and *John Wright* defendant, which began *Paſch. 38 Eliz. Rot. 628*. the caſe was as follows: the plaintiff ſhewed, that *Stephen Gardiner*, biſhop of *Wincheſter*, the 4th day of *July, 38 H. 8.* was ſeiſed of the manor of

Spiritual perſons, their tenants and farmers, may preſcribe in

non decimando.—In a ſuit for tithes in the ſpiritual court, a man may have a prohibition, ſuggeſting a preſcription or modus before or within pleading it.—See as to this point, 2 *Salk. 551* Conſta. 2 *Co. 43. Cr. El. 475. 511. Moor 425. S. C.*

Eastman

* The report of this important caſe is extracted from the manuſcript book of reports I have already referred to (*ſupra* 165.) from the collection of Mr. *Hargrave*. It is a much fuller and more correct note of the argument than any we have in print: *Walter's* argument is ingenious, logical, and ſpirited, and is the more valuable, becauſe the authority of this caſe hath been ſhaken upon that point of it which he ſo much laboured;

1596.

Eastmean, in the county of *Southampton*, in the right of his bishoprick; and that the said bishop, and all his predecessors of the said bishoprick seised of the said manor, had holden and enjoyed the site of the said manor, and all the demesnes of the said manor, *a tempore cujus, &c.* for him, his tenants and farmers, for years, or at will, *exonerat' acquietat' & privilegiat' de & a solutione decimarum quarumcunque de, in vel super præd' scit' & terr' dominic' & qualibet seu aliqua inde parcel' annuatim quovismodo per totum tempus præd' crescent', contingent', sive renovant'*: And the plaintiff conveyed to himself an interest for years in parcel of the demesnes of the said manor, by the demise of the said bishop; and that the defendant being farmer of the rectory of *Eastmean*, had libelled against him for tithes growing within parcel of the demesnes of the said manor, before the judges delegates; and although the plaintiff had shewed all the matter, and pleaded the same before them, and offered with inevitable proof to prove it, yet *prædicti judices delegati in prædict' cur' christianitatis coram eis placitum, allegationes & probationes prædict' Roberti Wright admittere recusaverunt*. The defendant to have a consultation, confessed that the said plaintiff had alleged all the matter aforesaid before the judges delegates, and that the judges delegates allowed the plea and allegation of the plaintiff, and admitted him to his proof thereof; *absq. hoc quod præd' judices delegati in curia christianitatis coram eis placitum allegationes & probationes prædict' Roberti Wright admittere recusaverunt*. And upon this plea the plaintiff's counsel demurred in law.

Walter, of the *Inner Temple*, argued for the defendant in prohibition. The principal matter, he said, is, if the plea in bar be good; and that involves this question, whether the traverse of the refusal of the plea in the spiritual court be well taken, or not.

it having been since holden that a prohibition shall not issue upon the mere suggestion of a modus, or prescription, but that it must be first pleaded, and such plea must have been rejected in the spiritual court. 2 *Salk.* 551. See also 1 *H. Bl.* 200. It appears from this report that my lord *Coke*, who was then attorney general and counsel for the plaintiff, has in his report of the case ascribed most of the topicks of his argument to the court. Indeed his lordship cannot be considered as affecting to give a correct statement of the resolution of the court upon this particular case, so much as of the general law upon the subject, as he cites a case in support of that resolution which was subsequent to it in point of time; I mean, the case of *Pigot v. Herne*, which was determined in *Hil. 40 Eliz.* I have subjoined my lord *Coke's* report of the case, because the references are in general made to that report, and because the opinions of so great a man must command the attention of every one who has studied, and who respects the laws of *England*.

And

And it seemed to him that the traverse was properly taken. A 1596.
man is always to traverse that which is material, and the substance
of the action of the other party. Then the substance, ground, and
cause of this prohibition is, the refusal of the plaintiff's plea in the
spiritual court. For prohibitions are grantable to the spiritual
court in two cases only: the one, when the spiritual court hold
plea of that which appertains to the common law: (for the com-
mon law has the prerogative, and where the common law may in-
termeddle, there the spiritual court shall not interfere: and in
such case, (as 8 R. 2. *attachment sur prohibition*), a man shall have
an attachment without a prohibition, for the law is a prohibition).
The other case wherein prohibitions are grantable, is, where the
spiritual court is not competent to do right to the parties. In all
other cases prohibitions ought not to be granted. In 44 E. 3. 32.
if a man sue in the spiritual court for rent reserved on a lease of
tithes, a prohibition lies; for an action of debt may be brought for
this at common law. In 22 E. 4. 20 b. if I owe one 10l. and
swear to pay him by a certain day, and upon that he sues me in
the spiritual court *pro lesione fidei*, a prohibition lies; for he may
have an action of debt against me for this at common law. So
Pierce Peckham's case, 4 H. 7. 13. If a man sue one in the spiri-
tual court for a spiritual cause, and they refuse to deliver the libel to
the party according to the statute of 4 H. 7. c. 3. by all the judges,
a prohibition is to be granted; for the non-delivery of the libel is a
tort, which tort is a matter temporal, and punishable by the tem-
poral law; so that in these cases a prohibition is grantable. Then
here the subject of the suit in the spiritual court is tithe, which is
a spiritual thing: but the cause of the prohibition is the tort done
to the plaintiff by their not allowing his plea and proofs; then that
is the substance of his suit, and if so, it is traversable more properly
than any thing else: for whether there be such a prescription or
such a lease as the plaintiff has alleged, is not the cause of the pro-
hibition; for if this be true, and the spiritual judge admit his plea,
he cannot have a prohibition; so that the refusal is the sole ground
and cause of this suit, and therefore must be traversable within the
general rule of traversing.

But it will be objected, and so it has often been in such cases,
that the allegation of this refusal is merely matter of form, and not
material, and therefore of course not traversable. Sir, that we
deny. For if a man be sued in the spiritual court, and it be ad-
mitted, that he has matter to plead which at common law would
bar

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bar the libellant, but that such matter would not be any bar by the spiritual law; yet, even in this case, he shall not have a prohibition until he has pleaded such matter in bar in the spiritual court; or, if, after he has pleaded it, he sues out a prohibition, and does not allege that he offered such plea, and that it was refused, upon that surmise he cannot maintain the prohibition. This appears by 7 E. 6. 79. where a case is put, that a man had used to pay for the tithes of a close for the space of six years and more, 12 d. *per ann.* to the parson or vicar for the time being, and being sued by the farmer of the parson in the spiritual court for the tithes in kind, he pleaded this payment of 12 d. for the tithes, which plea was not allowed by the ecclesiastical judge, and sentence was given for the farmer. A prohibition was granted in this case by the king's bench by good advice, there being an averment in the suggestion that the spiritual court would not admit his plea; which matter without that averment in the suggestion would not have been of itself sufficient: so that this is material, and not a thing of mere form.

Cro. El. 88.
S. C.

Accordingly it was adjudged in this court, *H. 30 El.* in the case of *Bagnall v. Stokes*. *Bagnall* sued in the spiritual court for a legacy, whereas the defendant there had a release from him of the legacy, but there was only one witness to prove it, and thereupon a consultation was awarded: but, if in his suggestion he had shewn, that he had pleaded this release in the spiritual court, and produced his witness, and they would not allow it, because there were not two witnesses, it was agreed, that this would have been a good suggestion. Which proves that this allegation is material, else the omitting of it could not have been material. If this be not allowed, it will alter the whole course of the law; for it is a rule, that a man shall not have a prohibition upon that which he may plead in the spiritual court. So is the 8 E. 4. 14. where *Choke* says, if a parson lease to me by deed all the tithes of his benefice, and afterwards sue me for the tithes of my own lands, I shall not have a prohibition; for I may plead this in bar in the spiritual court. And so it was in this court in the 31 of *Eliz.* between *Cooper* and lady *Gresham*, who libelled as appropriatrix of the parsonage against *Cooper*, in the spiritual court for tithe hay, and he suggested that he and those whose estate, &c. have paid from time immemorial to the vicar of that church 4 d. for the tithe hay of that manor; and it was adjudged that a prohibition did not lie upon this, for the *modus decimandi* did not come in question; but the matter was, whether this belonged to the parson or the vicar; and

Cro. Eliz.
236.

Q. Whether
this case be
correctly
reported by
Croke.

In the same
book, page
139, it
seems as if
it had
turned upon
a different
point.

and it is a good plea in the spiritual court to allege, that the tithe belongs to the parson or the vicar ; whereupon a consultation was awarded. So that wherever the matter is pleadable in the spiritual court, a prohibition shall not be had upon it. And in this case it appears that it is a good plea ; for we by way of bar allege, that he pleaded this matter, and the court allowed it, and received his proof, whereupon he demurs, which is a confession of all matters in fact duly and properly pleaded : so that it appears to the court by the confession of both parties that it might be, and had been pleaded in the spiritual court, and had been there allowed.

But it may be objected, that though the parties have agreed upon this so as to conclude themselves, yet that this does not bind the court, who are still at liberty to judge upon it according to what they know from their own judicial knowledge. But I say, that upon this point of spiritual law, the court have no judicial knowledge at all, for that it is a matter merely spiritual. This appears in 34 E. 1. *Dett.* 164. If I am bound to enfeoff I. S. of the manor of Dale such a day, and on that day he enters into religion, or dies ; in debt upon this obligation I may say, that “ on the day he entered into religion, or died ;” and I need not plead that I tendered the deed of feoffment on the day : for it is apparent to the court that I could not perform the condition, so that I could not be bound to make a tender of that which was become impossible. But in the above book it is, that if I am bound to present I. S. to a benefice, when it becomes vacant, and at the time that it falls vacant, he is married, so that by the canon law he is incapacitated from taking it, in that case it is not sufficient for me to say in an action of debt that “ I. S. was married at the time ;” but I ought to say, that “ I presented him to the ordinary, who refused to institute him as being an unfit person ;” for this is a spiritual matter of which this court cannot judge. And that this court cannot take notice of spiritual matters appears by the general learning of the books, where it is taken for a rule, that if the act be alleged to be done in the spiritual court, it shall be taken to be duly done, and shall never be examined here ; for this court cannot judge of their law. In 4 H. 7. 14 b. if two persons are candidates for the place of abbot, and one of them has two votes, and the other twenty ; and they interplead in the spiritual court, and there it is awarded, that he who has the smaller number of votes shall be the abbot, he shall be admitted to be the abbot, and shall sue and be sued here as such. In 20 E. 3. *Conisans* 46. if a layman be made

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made an abbot who has conuſance of pleas, he ſhall demand conuſance in this court, and the king ſhall not countermand it by reaſon of the diſability of his perſon ; for being abbot in fact, it ſhall be allowed to him in this court until he is deprived. So in 40 E. 3. 28. by *Kirton*, if a divorce be unduly obtained in the ſpiritual court, yet it ſhall be allowed in this court, until it is repealed. Which proves that this court has no judicial knowledge of their law. For how can they have it ? for their ſpiritual laws are continually altered by conſtitutions, as the common law is by ſtatutes. And how can this court know every conſtitution ? It is not poſſible. They can have no judicial knowledge of any thing contrary to the agreement of the parties. And the truth in our caſe is, that the defendant actually pleaded this matter, and produced his proofs, and they were not ſufficient to prove his allegations : if then this allegation be not allowed, great miſchief and inconveniency will enſue, and the ſpiritual court cannot determine any matter. For if I am ſued in the ſpiritual court, and I plead matter of bar, or diſcharge, or proceed to proof of it, but my proofs fail, whereupon ſentence is given againſt me for default of them ; and I afterwards come here or to the common pleas, (but more eſpecially here, for it appears by the books that the common pleas cannot grant a prohibition, but where the matter which is in ſuit in the ſpiritual court is depending in ſuit before them ; whereas this court can grant a prohibition in any caſe), and I ſurmife, that I offered ſuch matter in the ſpiritual court, and they refuſed my plea, or that I had but one witneſs to prove it ; if then this ſurmife be not traversable, I compel the other party to take iſſue with me here, and the matter ſhall be tried here again. I know the whole matter, and all that he can allege in the ſpiritual court, and now*

which is a great inconveniency, an intolerable miſchief, charge, and delay, to the party. In 1 R. 3. 4. *Huffey* held, that if the original ſuit ought to begin in the ſpiritual court, and be there begun ; though a thing which is triable by our law ſhould afterwards come in iſſue, yet it ſhall be tried by their law. But, if ſuch ſuggeſtions as theſe are ſuffered to paſs without any check or controul, they will never try a thing triable by the common law, nor a thing triable by their own law ; but when the defendants have pleaded in the ſpiritual court, they will come here, and ſurmife that they offered ſuch matter in the ſpiritual court, which that court would not admit, and then they will

* The paſſage is ſo blind in the manuſcript, as to be in this part wholly illegible.

will try it here. So that the admission of these false surmises will be the utter subversion of all law and practice.

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But it will be farther objected, that this is but a surmise contained in the declaration, and surmises are not traversable. I must agree that surmises of themselves are not traversable; but then this is not a mere surmise; for every matter alleged in the declaration is not a surmise; for there is matter in fact alleged in it, as well as surmise. As in a formedon, the gift is traversable, for that is alleged in fact, but the deforcement is surmised. The surmise is always the point of the writ, and that cannot be traversed; but all other matters alleged in the declaration are traversable. The point of the writ in our case is, that he sued *contra prohibitionem regiam*, and that, it is true, is not traversable. So in *Pell and Sanderfon's* case in the 1st of *Eliz.* it is said, that the defendant ought to defend the contempt, but shall not traverse it. But this matter of the refusal of the plea is a thing alleged in fact, and not a surmise, and so we are not within the rule. But, if it be a surmise, yet in this case it is traversable; for this is a cause which ousts another court of their jurisdiction, which is prejudicial to that other court, and therefore traversable; as in 12 *H. 4.* 13. 17. and 13 *H. 4.* 14. this difference is agreed; that if a man remove a plea out of any court, which is not the king's court, for a certain cause, such cause is traversable: but, if it be out of one of the king's courts, it is otherwise; for both being the king's courts, no prejudice is done to any other person by it, as it is where it is removed from the court of a stranger. In this case, the court to which the prohibition is to go is the ecclesiastical court, which will be prejudiced; so that the matter of the surmise is traversable. In 34 *H. 6.* 15. if a man sue one in the common pleas, and he pray his privilege of the exchequer, for that he is a servant to one of the officers there, and attendant upon him in his office, this is traversable; for it may be said, that he is the officer's husbandry servant in the country, *Without this*, that he is attendant upon him in his office, which is a good plea.

It may then be objected, that the practice of this court is quite contrary, and that no such traverse has ever been seen here. But that is not so, for several cases have been resolved here upon that point. The first case was that of *Eaton and Morris*, *P. 30 Eliz.* where the plaintiff sued out a prohibition and alleged, that the defendant, as parson of *D.* had sued him in the spiritual court for tithes, and that he had there pleaded, that the defendant had not

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not read the articles according to the statute of 13 *Eliz.* and so was *ipso facto* deprived, and that the spiritual judge had refused to admit that plea; upon which it was moved on the other side that a prohibition would not lie upon this, for it was pleadable in the spiritual court: and it was alleged, that it was false, and used only for delay, upon which the court advised the defendant in the prohibition to traverse it: and by that advice the defendant pleaded, that the spiritual judge did not wholly refuse to allow the plea, *et de hoc petit se super patriam*. The plaintiff demurred to this plea, and it was adjudged to be no plea, as it was pleaded, for this issue could not be tried, no place being alleged where the court was kept. For it is not necessary to allege it in the declaration, because that contains divers issuable matters, and it is not the practice to allege it there. But, when one of two things is traversed, the place shall be shewn in the replication, which might well have been here, if he had taken his traverse with an *absque hoc*; but, when he says *quod non penitus recusavit, et de hoc petit se super patriam*, he has stopped the plaintiff, so that he cannot come with his replication to shew the place; and for that reason the plea is ill. Besides, when he says *non penitus recusavit*, this makes the issue uncertain and pregnant. And for these causes the plea was ruled to be bad; though it was holden, that it was traversable if well pleaded. In *Tr. 30 Eliz.* there was the case of *Apsol and Wigen*, where there was the like surmise, that he had pleaded that the parson had not read the articles, and that that plea was refused in the spiritual court; and the court being informed that this was false, they advised the defendant to traverse it; and it was urged by *Coke*, that this was not traversable; but notwithstanding that, the opinion of the court was, that it might be traversed. And so they advised Mr. *Lewin*. So in *Hil. 32 El.* a prohibition was brought here upon the same surmise again, and the case was moved by *Lewis*, who informed the court that it was brought solely for delay, and that the surmise was false; and the whole court advised him to traverse the offer of refusal. In many other cases I have known this debated for the king, and agreed that the surmise was traversable. The case of *Futter and Whijkin* was moved by Mr. Attorney, that if a prohibition be sued here, and it be surmised that the plaintiff pleaded such a matter in the spiritual court, and offered one witness to prove it, and the spiritual judge would not admit it, if the defendant will plead, that he offered two witnesses in the spiritual court to prove it, *absque hoc* that he offered only one; Mr. Attorney insisted,

isted, that this was not a good plea; but all the court held it to be a good plea; wherefore the surmise is traversable. In *M. 32 & 33 Eliz.* there was the case of *Bennet v. Shortwright*, parson of *Matching*, who had libelled in the spiritual court for tithes of corn: the defendant sued out a prohibition, and surmised that in that parish they had immemorably used to pay the tenth sheaf in satisfaction of all tithes of corn; and in those years in which the subtraction was supposed, he had severed it from the nine parts, and the parson had taken it; and he alleged, that he had offered this plea in the spiritual court, and they had refused it. *Godfrey* moved, that a prohibition would not lie in this case, inasmuch as here was no *modus decimandi*, but it was only for tithes in specie; so that it was confessed that the plaintiff has cause of suit in the spiritual court. But the court held the suggestion to be good; for if a parishioner set out his tithes, but the parson will not take them, or they are destroyed by cattle, he shall not have the tithes again; and if the spiritual court will not admit such a plea, a prohibition lies. *Godfrey* then said, that he would take issue that the spiritual judge did not disallow it; and the court said, that he might do so. In *H. 13 Eliz.* a prohibition was sued out to the admiralty court upon a writ there on a bond, surmising that it was executed in *England*, and not beyond the sea. There, it was agreed, that if the bond be executed upon land, the suit should be at common law; but, if it be executed beyond the sea, the party has his election to sue in the admiralty court, or in this court; and that for this reason, that it may be, that all his witnesses whom he has to prove the bond are abroad, so that he cannot have any benefit from it here; but in the civil law he may in this case, if the truth be that the bond was executed abroad, and that his witnesses are there. If then he sues in the admiralty court, and the defendant surmises that the bond was executed here upon land in order to have a prohibition, and this surmise cannot be traversed, it will take away the whole benefit of his bond. And so all these mischiefs, and many more, which the understanding of the court will imagine, will ensue upon this, if these false surmises are not to be traversed.

As to the second point, *viz.* the prescription that the bishop, and his predecessors, for themselves, farmers, and tenants for years or at will, have holden and enjoyed the said lands privileged and freed from the payment of all tithes renewing and coming of or upon the said lands, it is not good; for it is a prescription *in non decimando*, which cannot be. In the 8 *E. 4. 24.* *Choke* puts this generally

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Supra 163.

Supra 161.

nerally without exception, that a man may prescribe in *modo decimandi*, but not in *non decimando*. The reason is, that at first, parsonages consisted solely of tithes, and so several do now ; but by the bounty of good men they were afterwards endowed with glebe : if then men might prescribe in *non decimando*, the successors^d would have nothing to live upon in a little time. However, a difference has been taken between a layman and a spiritual man : a spiritual man may prescribe in *non decimando* ; and the reason is, that this is no prejudice to the church, for the church will still have the tithe. But, if a layman were to keep the tithe, then that would be a prejudice to the church. According to this it was ruled in this court *Hil. 33 Eliz.* between *Wickham, bishop of Lincoln, and Cooper*. *Cooper* sued the bishop in the spiritual court for tithes, and the bishop sued out a prohibition, and surmised, that he and his predecessors were seised of the lands of which the tithes were demanded, and that when they were in their possession they had holden them discharged of tithes ; and he shewed, that in the time of *E. 6.* the lands were granted to the duke of *Somerſet*, and that they afterwards came back again to the bishoprick. In this case there was great debate if this prescription were good, and yet it was special only, to hold the lands discharged, whilst they were in their own possession. But the prescription was holden to be good ; for it was said, that tithes are spiritual things of which a spiritual person may prescribe to be discharged, though a temporal person cannot. But in the present case the prescription goes farther ; for here it is for himself, his farmers and tenants for years or at will ; and it seems to me, that this cannot be good for his tenants for years or at will, for they are not spiritual persons. Besides, this is annexed to the person of the bishop, and not to the lands, so that the lessees cannot partake of it ; for of a privilege annexed to the person of a man no one else can have the benefit. And therefore in *30 H. 8.* if a parson make a feoffment of the glebe, the feoffee shall pay the tithes of it to the feoffor, for he does not partake of the privilege annexed to the person. And it was so adjudged in this court, *M. 31 & 32 Eliz.* between *Perkins and Hinde*. If a parson lease his glebe, rendering a small rent,* he shall have the tithes : but, if a great rent be reserved, nearly to the amount of

* This case is not correctly stated by *Mr. Walter*. The judgement of the court was not governed by the reason here given. *Vide supra* 162.

the value of the land, he shall not have the tithes; for it shall be intended that this rent was reserved as well for the tithes, as for the lands. It will be a hard matter to make this a good prescription as it is laid. It is not good, as it seems to me, because the prescription is in tenants for years and at will, *viz.* that by himself and his farmers he has holden the lands discharged, which cannot be good, as in *Chaworth's* case in 9 H. 6. 62. where in trespass the defendants pleaded, that the prior of *St. John of Jerusalem* was seised of such a manor, and that he and his predecessors, and all their tenants at will of the said manor had had common of turbary in the place where, &c. and that they as such tenants at will of the said manor, &c. And by the whole court, Clearly this is not good, for tenants at will cannot prescribe in this manner; for they ought to say, that the lord of the manor of S. hath had common for himself and his tenants at will. And so is 11 H. 7. 6. Then here he lays the usage for his tenants at will, which is just as if he had prescribed that he and his tenants had holden the lands discharged. But, if he had prescribed for himself and his tenants, the nature of the thing would shew that that could not be: for he could not have the land discharged for him and his tenants, because tithes are not parcel of the land, and a thing issuing out of the land, but they are a collateral profit, to be taken upon the land. ^{Supra 164.} This appears by the case of *Sherwood and Winchcombe* in 34 & 35 Eliz. where a man prescribed to have tithes as parcel of a manor: for by *Popham*, nothing can be parcel of a manor but what is part of the land, or issuing out of the land; and tithes are but collateral things to be taken upon the land. That is the reason too of 30 H. 8. that if a parson make a feoffment of his glebe, or purchase land within his parish, and make a feoffment of that land, he shall nevertheless have tithes from his feoffee; the tithes are not extinguished, because they are not things issuing out of the land. So in *Hinde and Perkins* it was agreed, ^{Supra 161.} that if a parson release to his parishioners all his right in the land, yet this does not extinguish his tithes, for they are not issuing out of the land. Then if they are not issuing out of the land, when he makes a lease for years, he is not chargeable by any means with them; therefore he cannot have a discharge for himself and his tenants for years, &c. for his estate was never charged.

But this prescription is not good for another reason: for he prescribes that *Stephen*, and all his predecessors bishops of *Winchester*

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case, were a sufficient averment. But here it is not so, but amounts to no more, than that all his predecessors were seised; which would not be sufficient. 1596.

This prescription does not extend to discharge the plaintiff of the tithe of lamb and wool; for it is, that they hold the lands discharged of all tithes, which must be understood to be the tithes of those things which come immediately from the land, as hay, grain, and fruit, and not of the cattle upon the land, with the wool of those animals. For prescriptions shall be taken strictly. In 5 E. 4. 12. if a man prescribe for himself and his tenants at will, that will not serve for copyholders, and yet they are but tenants at will. In 9 El. it was holden in a case between *Rusb* and *Berrington*, where a man prescribed to have common of estovers, as belonging to a house, that this should not extend to house-bote and plough-bote, but only to wood to burn in the house. So here this prescription shall not extend to sheep, &c.

Coke, the queen's attorney.—There are two points; the first, whether the prescription be good: and the other, whether the traverse be good. I argue that the prescription is good; and we are to inquire who was capable of tithes in pernancy at common law, and who was capable of a discharge from them, and in what manner they could be had in pernancy, and how there could be a discharge of them at common law or afterwards by any means. As to the first, I hold that no persons but spiritual persons were capable of tithes in pernancy, for none but spiritual persons could take tithes*. For the men of the church were like the apostles, who had no certain livelihood, but depended upon the devotion of the people to give what they pleased and to whom they pleased. As *Parn.* says in 7 E. 3. 5. before a constitution then lately made by the pope, a patron might give to any parson of any parish he pleased. But men were more careful to give their tithes at that time than they are now, and the church had its . You may see in the time of *William the Conqueror* the care that was taken touching these things, *de omni annona sua decima garba infimul de omnibus rebus quas dederit Deus tuæ decimæ reddendæ sunt.*

* The manuscript is here imperfect, and two or three passages seem to be huddled together in one sentence. The council of *Lateran* is stated to have been under the emperor *Dioclesian*. The omission might have been supplied, if the passages had seemed to be of sufficient importance; for my lord *Coke*, in his report, has put them in the mouth of the court.

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And I have heard Dr. *Andrews* say, that this was their tenure of God; and 11 *Aff.* 29. no man can sue for tithes but only a spiritual person; and by 22 *Aff.* 157. the parson of each parish shall have the tithes; and if they are not within any parish, then the king shall have them; for he is capable of tithes in pernancy, because he is *persona mixta*. And in 44 *E.* 3. 5. in an assize for tithes before *Lodlow*, he said, that in former times every man might grant his tithes to what church he would; so that it must be always a spiritual person who had them by way of pernancy. And to the same purpose is 10 *H.* 7. 13. It was taken to be a damnable thing that a layman should have tithes. But there is a difference between a common person and the servant of a parson. By 33 *H.* 6. the lessee of a parson shall have tithes; and he shall sue for them in the temporal court. Indeed 35 *H.* 6. and 40 *E.* 3. 28. in suits between the vicar and the parson, the spiritual court shall have jurisdiction: but 45 *E.* 3. 17. if the right to tithes come in question between the farmer of a parson and a layman, the trial shall be at common law and not in the spiritual court. It appears therefore that the farmer of a parson might have had tithes in pernancy; and now the statute of 31 and 32 *H.* 8. gives laymen a remedy for them in the spiritual court. For before this statute, a layman could not have tithes in pernancy, because he had no remedy for them: but any layman was capable of being discharged of tithes, because there he was not put to any action for them. In 8 *E.* 4. 13. a layman prescribed to be discharged of tithes, under a composition with a predecessor of the parson and the ordinary, who granted that he and his assigns should be discharged; and the discharge was holden good for him and his assigns. So *F. N. B.* 41 *G.* And in the *Register* 38 b. there is an instance of such a composition with the assent of the bishop as patron and ordinary. It follows therefore that a lay person might be discharged of tithes at common law, though he was not capable of them in pernancy, having no remedy to recover them; and it is all one not to have the thing, and to have no means of getting at it. But now the statute of 32 *H.* 8. c. 7. gives a layman a remedy to recover the tithes which he is capable of taking. If then he is capable of taking them in pernancy, let us see how this right to them in pernancy arises. This must be either by composition, or by grant, or by prescription; and so of discharges of the payment of tithes. But we must give a remedy in this court to the party who has such discharge; for if he has no remedy here, he will be without remedy.

For

For in this point we act quite contrary to the civilians; they will not allow any discharge of tithes, because, they say, that tithes are due to the church *jure divino*, and therefore the person being lay, and tithes spiritual, they will not admit any plea in discharge of them. A layman of himself cannot originally be discharged of the payment of tithes by prescription, but the prescription must first settle in a person who can prescribe in discharge of them; for if it do not first settle in such a person, no benefit can arise from it to any one. But, if the prescription of discharge be once settled in any one who is capable of prescribing, if he transfers it to another, that other shall take advantage of it. And for this I rely upon the words of the statute of 32 H. 8. c. 7. that "*no person or persons shall be sued or otherwise compelled to yield, give, or pay any manner of tithes for any manors, lands, tenements, or hereditaments, which by the laws and statutes of this realm are discharged or not chargeable with any such tithes.*" So that it appears by the very words of the statute, that the law allows a discharge of tithes, and for that reason the statute provides a remedy. And as the civilians will not allow this, it is reasonable that we should give a remedy here. As to the other mode of discharge by grant or composition, I rely upon *F. N. B.* and the *Register*; for where it was granted to *A.* with the consent of the patron and ordinary, that he should be discharged: there, if he assigned to *B.* *B.* should enjoy this discharge. If then a discharge be settled in a man by grant or composition, and his assignee shall take advantage of it, so it shall be here with the lessee of the bishop. For in this case the bishop has made a lease for years, and the prescription first settled in the bishop, who is capable of prescribing to be discharged: and this discharge runs with the land; and the very words of the stat. of 2 E. 6. c. 10. § 4. provide, "that no person shall be sued or otherwise compelled to yield, give, or pay any manner of tithes for any manors, lands, tenements, or hereditaments, which by the laws and statutes of this realm, or by any privilege, or prescription, are not chargeable with the payment of any such tithes, or that be discharged by any composition real." The statute therefore allows a discharge of tithes in the land, and the discharge to follow the land, if the discharge has had a legal commencement. Here the discharge had such commencement; it first settled in the bishop, and so runs to his lessee. And there are several manners of discharge, as appears in 10 *Eliz. Dy. 277 b.* where it is said that the Templars,

1596. Hospitallers, and Cistercians, had a privilege from *Rome*, *quod non tenentur solvere decimas prædiorum suorum quæ propriis manibus aut sumptibus excolunt*, but that their farmers should pay tithes. In *Knight* and *Spencer's* case, unity of possession was held a sufficient discharge from the payment of tithes, and that this might serve for their farmers; as appears by the case of the templars, who were discharged of the tithes of those lands, *quas propriis manibus aut sumptibus excolunt*; and no doubt but that if it had been general for them and their farmers, it had been good. And here we are just in the case of such a prescription. For this I refer to a case in 18 *Eliz. Dy. 349*

Supra. 136.

b. It is the case of the parsonage of *Peykirke* and *Elmeton* *juxta Peterborough*; where the dean of *Peterborough* prescribed that no tithes were ever paid in the manor in question by the farmers by lease or at will, except wool and lamb; and the parson libelled against one of the farmers for tithe of hay and grain, a prohibition was granted. And this in effect is our case; for the lessee was discharged by the prescription in the parson for himself and his farmers. It was agreed in the 28 *Eliz.* in the case of the *bishop of Winchester* and the parson of *Buckden*, that the bishop might prescribe to be discharged of tithes; for he who may have tithes paid to him, may prescribe to be discharged of them. But there indeed there was no lessee. But in 34 and 35 *Knightley's* case, commonly called the *Casè de Ratione*, it was agreed, that if a parson has been parson imparsoned time out of memory, so that no one can tell, he by this prescription may be discharged; but, if he makes a lease, his lessee shall pay tithes: but, if he prescribes that he and his lessees may retain, then he and his lessees shall be discharged by way of retainer. There was a case between and *Grevell*, which was like the present case, and the defendant pleaded the same plea; and in that case by order of the court issue was taken, whether the lessee had paid tithes or not; for if he had not paid them before, he should be discharged; and there the freehold was out of the spiritual person who prescribed. But here the freehold is remaining in the bishop, and therefore his lessee shall be privileged from the payment of tithes. And so upon that point I pray a prohibition.

As to the point of the traverse it seems to me, that the refusal is not material, and therefore not traversable. And as this seems to be plain, I will be short upon it. It has been often ruled. There is the case of *Euton and Morris*, *M. 31 & 32 Eliz.* where, upon a suit for tithes in the spiritual court, the defendant sued a prohibition, and

and surmised, that the parson who had libelled against him in the spiritual court for the tithes had not read the articles according to the stat. of 13 *Eliz.* and so was not parson to demand the tithes, and that he offered this plea to the spiritual court; and they refused it; the defendant in prohibition said, that they accepted the plea in the spiritual court *absque hoc* that they refused to allow the plea; and upon that they joined in demurrer; and it was ruled, that the prohibition should stand. And there one reason for not granting a consultation was, that no place of the refusal was shewn, and therefore they could not try it. But the whole court upon the other point said, that notwithstanding this consultation was granted, because the refusal was traversable in this case, yet they agreed, that if he had prescribed *in modo decimandi*, or to be discharged of tithes, the refusal would then not have been traversable, because the spiritual court will not allow any pleas in discharge in such cases; for they say there it is *jus indelibile et non jus divinum*; but they will allow discharges which the statutes make. And so *Coke* concluded with declaring that the refusal is not traversable.

GAWDY. You have cited the case of *Peykirk and Elmeton* to shew that the lessee shall be discharged: it is a good case, and it proves directly that the lessee of a parson may be discharged of tithes by prescription in the parson. Then as to the traverse, I hold that the refusal is not traversable, because it is but matter of surmise, and not the substance of the action. And for this I refer to the case of *Wimbish and Willoughby* in the *Commentaries*, 76. where upon a surmise the plaintiff had the writ directed to the coroners; and the whole court agreed that he might in an assise, because the assise is the speediest remedy that can be, the jury coming at the first day, and therefore is to be favoured. But the reason why I cite this case is, that the party is not at any mischief, for the other party has no remedy for this, it being but matter of surmise, and not of substance, and therefore not traversable. So here, though the allegation of refusal were true, we could not grant a prohibition upon it; but we grant the prohibition upon the body of the matter, whether the discharge be good, and the surmise is but matter of form, and so not traversable, any more than in a writ of *cofinage* the conveyance of the pedigree is traversable, because not matter of substance. For in all actions the substance of the action is traversable, and not that which is but mere form and matter of course. As in an action of trover and conversion, the conversion is not traversable, for that is not the cause of action (a), but the defendant ought to plead not guilty. So (a) Qu

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here, the refusal is not the substance of his complaint, but the discharge is the substance and ground of the prohibition; and because the spiritual courts will not allow of any discharge, we are therefore used to grant a prohibition. I hold therefore the discharge to be good, and that the lessee may well take advantage of the prescription.

FENNER agreed with GAWDY, that the prohibition lay in this case, and that the refusal is not the cause of the prohibition; for even if the spiritual court were to accept the plea, we should grant a prohibition, if the matter did not lie within their consuance, or if the party could not have right done to him there. And so if a party can shew sufficient matter for a prohibition, we are not to wait their leisure to see whether they will receive his plea or not. In this opinion POPHAM concurred; and they all agreed, that the prescription was good for the lessee for years, and that he might well enough take the benefit of the discharge.

At another day the case was moved again by *Tanfield*, who argued for a consultation, and said that Mr. Attorney had always stated the case to be, that the bishop and all his predecessors had holden the land discharged of tithes, but that the pleadings were not so; for it appears by them that the bishop had the rectory as well as the land, and that he and all his predecessors by themselves, their farmers and tenants at will, had holden the land discharged and privileged from the payment of tithes; and that would make a great difference, as it seemed to him: for he agreed that where the land is discharged of tithes by composition real, the lessees and farmers shall hold it discharged; but where the discharge is only from the payment of tithes by unity of possession in the hands of one who is capable of prescribing *in non decimando*, when the land goes out of those hands it shall pay tithes, and the privilege will not change with the land, for that would be to make a prescription *in non decimando* in a layman, which cannot be. And he put a case which was in the exchequer chamber by *English* bill in the 31st of *Elizabeth*. The queen had lands in her hands: it was holden by all, that she should not pay tithes. The queen made a lease for years: it was much questioned, whether the lessee should pay tithes; and a case was drawn, and the opinion of the justices was delivered; and at length, after great advice, it was resolved, that the lessee should pay tithes, and so it was decreed. And he said, that he could not see any difference between the cases; for the bishop having privilege *in non decimando* only by reason of his person, could not trans-

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fer that privilege to another. POPHAM said to FENNER, that the case certainly was so ; but they all said that there was a great difference between the cases, for that the queen is only privileged by reason of her person.

POPHAM. It was formerly lawful for a man to pay his tithes to whom he pleased, provided he were a spiritual person : for the same reason a spiritual person may retain his tithes, and not pay them at all, and then the parson has no interest in them.

TANFIELD. It appears in our case, that the bishop has the rectory and the land, and this is manifestly the ground of the discharge.

GAWDY. Do you say RATIONE INDE he was discharged ?

TANFIELD. No.—Whereupon the court agreed, that the prohibition should stand, and that no consultation should be awarded upon both points.

[Here follows Lord Coke's Report.]

In this case three points were moved : 1. Whether the said prescription for discharge of tithes was good or not. 2. Whether the plaintiff, being a layman, should take benefit thereof. 3. Whether the said traverse was good nor no. And as to the first point, three things were considered : 1. Who were by the common law capable of tithes in perannuity, and who not. 2. Who was capable of a discharge of tithes at the common law, and who not. 3. How he who was capable of a discharge, might be discharged of tithes, *scil.* either by prescription, or by composition, &c.

As to the first it was resolved, that none by the common law had capacity to take tithes, but only spiritual persons, or a mixt person, and regularly no mere layman was at the common law capable of them, unless in special cases ; for no layman but in special cases could sue for them at the common law in the spiritual court, *scil.* for the subtraction of them. See the books in 7 E. 3. 5. 11 Aff. 9. 44 E. 3. 5. b. 10 H. 7. 18. a. and 7 E. 6. Dyer 84. and the books in 43 E. 3. 34. a. and 44 E. 3. 39. a. b. that a farmer of a parson may sue for tithes ; but it appears that such farmer was a spiritual man, as vicar, &c. And so it was said by some are all the other books in 31 H. 6. 11. a. 35 H. 6. 39. a. b. 2 E. 4. 15. a. b. 6 E. 3. 4. a. b. 12 H. 7. 24. b. (in which in truth there are but opinions) to be intended : and if the common law had generally enabled a layman to be capable of tithes, the common law would have given him remedy for the recovery of them ; but regularly a layman had no remedy for the subtraction of tithes, till the

1596. statute of 32 H. 8. c. 7. But see 22 Aff. 75. that the king was capable of tithes at the common law, for he was *persona mixta*, and his patentee also by his prerogative, as it there appears.

As to the second point it was resolved, that a mere layman who was not capable of tithes in pernancy, was notwithstanding capable of a discharge of tithes at the common law in his own land, as well as a spiritual man; for by the common law, the parson, patron, and ordinary might have discharged a parishioner of tithes in his land, &c. or the parishioner might have given part of his land to the parson for a discharge of tithes in the residue. And for proof thereof see the book in 8 E. 4. 14. a. b. and *Register* 38. where it appears that a layman might be discharged of tithes at the common law; but a layman might be discharged of tithes at the common law by grant, or composition, as it appears in the said books, but not by prescription to be discharged of tithes; for it is commonly said in our books, that he may prescribe *in modo decimandi*, but not *in non decimando*, and the reason thereof is, because he is not, but in special cases, capable of tithes at the common law, and therefore without special matter shewed, it shall not be intended that he hath any lawful discharge. And for this reason, in favour of holy church, although it might have a lawful beginning, the law will not suffer such prescription in this case, to put it to the trial of laymen, who will rather strain their consciences for their private benefit, than yield to the church the duties which belong to it. And the law had great policy therein, for the decay of the revenues of men of holy church, in the end, will be the overthrow of the service of God and of his religion. And therefore it is recorded in history, that there were (amongst others) two grievous persecutions, one under *Dioclesian*, the other under *Julian* surnamed *Apostata*; for it is recorded, that one of them intending to root out all the professors and preachers of the word of God, *occidit omnes presbyteros*, but notwithstanding that, religion flourished, for *sanguis martyrū est semen ecclesiæ*; and yet the same was a fearful and grievous persecution: but the persecution under the other was more grievous and dangerous, because (as the history saith) *ipse occidit presbyterium*, for he robbed the church, and spoiled spiritual persons of their revenues, and took all from them whereon they might live; and thereupon in short time did follow great ignorance of the true religion and service of God, and thereby great decay of the christian profession; for none will apply themselves, or their sons, or any other whom he hath in charge, to the study of divinity,

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when they shall have, after long and painful study, nothing to live upon. And it was said, that if a prescription in *non decimando* should be suffered, the church would rather lose than gain in these days. And for this reason such prescription was not allowable. But a spiritual person who was capable of tithes at the common law in pernaney, may prescribe to be discharged of tithes generally; for as he may prescribe to have a portion of tithes in the land of another, so he may prescribe to discharge his own lands of tithes; for it is commonly said in our books, that before the council of *Lateran*, every man might have given his tithes to any ecclesiastical person he would, and that appears by the books aforesaid. And note, it is recited by the statute of 2 E. 6. cap. 13. that land may be discharged of tithes by prescription, but that cannot be in case of a layman, *ergo*, it ought to be in case of a spiritual man. *Vide* 10 Eliz. Dyer 277. The orders of the *Cistercians*, *Templars*, and *Hospitularii*, were discharged of tithes *sub modo, scil. quamdiu propriis manibus excoluntur*, &c. and 18 Eliz. Dyer 340. And as to the second point, the same dependeth upon the first, for if the lands of the bishop were discharged in his hands absolutely by prescription, then the demising thereof to a layman, cannot make the same chargeable which were discharged before; and in that it may be more beneficial to the bishop, for in respect of that he might reserve the greater rent, &c. And as to the third point, it was resolved, that the traverse was insufficient, for as it is said in 8 E. 4. 14. a. the spiritual court will not allow any plea in discharge of tithes, and therefore the refusal in such case is not material, for the party may have a prohibition before any such plea pleaded by him in discharge of tithes, and therefore in such cases the allegation of the refusal of the ecclesiastical judge, are rather words of course than of effect and substance. But in some cases the refusal is traversable, as it was adjudged *M. 30 and 31 Eliz.* in this court, between *Morris* and *Eaton*, where the case was, that *Morris* was sued by *Eaton* in the spiritual court for tithes; *Morris* alleged there, that *Eaton* had not read the articles according to the statute, and that the ecclesiastical judge refused to allow the same; and this refusal was traversable by the judgement of the court, for otherwise, upon such surmise, all matters might be prohibited in the spiritual court, although the spiritual judge do all that belongeth to law and justice. And in the same case, the party grieved may have remedy by his appeal; but in the other case of discharge of tithes, or *de modo decimandi*, the judges of our law well know, that

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Supra 164.

that the ecclesiastical judges will not allow such allegation, and so is the difference. Note reader, a man may prescribe, that he and all those whose estate he hath in the manor of *Dale* in *Dale a tempore cuius*, &c. have paid to the parson of *Dale* for the time being, a certain pension yearly, for maintenance of divine service there, in contentation of all tithes renewing or arising within the same manor: and further prescribe, that he, and all those whose estate he hath in the said manor, time out of mind, have used in respect of the said pension so paid the parson, to have all the tithes accruing and arising within the said manor, or any part thereof, *scil.* of all lands holden of the said manor, or parcel thereof: and such prescription was adjudged good in the king's bench, *M.* 39 and 40 *Eliz. Rot.* 199. in an action upon the case between *Pigot* and *Hern*, in which case two points were resolved for good law. 1. That in such special case, a lay person, owner of the said manor, shall sue for the tithes upon the special matter aforesaid in the spiritual court, for it shall be intended at the beginning the lord was seised of the whole manor before the tenancies were derived thereout, and then by composition or other lawful means, the lord should have all the tithes within the manor for the said pension paid to the parson; and the law intendeth, that at the beginning it was for the maintenance of divine service, and *pro bono ecclesie*, the reason of which intendment is the continual usage, *a tempore cuius*, &c. It was resolved, that upon this special matter alleged, a man may have tithes as appurtenant to a manor; for he prescribeth by a *que* estate in the manor, and therefore cannot have them in gross. But it was adjudged in *Winchcomb's* case, in this court, in a prohibition *Hill.* 35 *Eliz.* that a man cannot prescribe generally in him and all those whose estate he hath in such manor, to have any tithes appertaining to the same; for without such special matter shewed, tithes which are spiritual things, and due *jure divino*, for the subtraction of which, remedy lieth only in the spiritual court, and no remedy at the common law, cannot be parcel or appurtenant to a manor, or any other temporal inheritance.

Tr. 38 Eliz. A. D. 1596.

Sherington v. Fleetwood. [Cro. Eliz. 475.]

PROHIBITION for tithes. *Popham* said, If land be overflown with water, and afterwards gained by industry, tithes shall presently be paid thereof, although it had been overflown time whereof, &c. So, if land be full of thorns and bushes, from time whereof, &c., and it be grubbed up and made meadow, or arable land, tithes shall be presently paid thereof, notwithstanding the statute 2 Ed. 6. For those lands of their own nature were not barren, but by negligence, or ill husbandry became so. And the statute doth not intend that tithes shall not be paid within seven years after the manurance, &c. but of such land as was merely barren, and made good by foldage, or other industrious means. And this was agreed by the other justices. He also said, That it hath been here adjudged, that tithes shall not be paid for rakings, unless they be foul rakings. The prescription also was, That he used to pay 1d. for every milch cow, in satisfaction for the tithe of milch kine and beasts agisted, which was moved not to be a good prescription: for tithes for one thing cannot be tithes for another. But, if he had prescribed, that he had paid 1d. for all cows and beasts agisted, that peradventure had been good: and this diversity was so ruled in the case of Dr. *Lewes*; and of that opinion were the court here. Then *Godfrey* moved, that no tithes by the law are payable for beasts agisted, and so is *Nat. Br.* 53. But all the court held, that for beasts agisted for hire, or for dry cattle which are depastured to be sold, tithes shall be paid: but for dry cattle reared for the plough, or to be expended in the house, no tithes shall be paid. *Sed adjournatur.*

Land drained or grubbed, shall pay tithes presently.

Moore 909.
S. C. S. P.

Tithes shall not be paid but for foul rakings.

Moore 909.
Goldb. 147.
S. C. S. P.

No tithes for dry cattle reared for the plough or house.

Tr. 38 Eliz. A. D. 1596. B. R.

Green v. Balser;

or,

The Archbishop of *Canterbury's* Case. [2 Co. 42.]

IN a prohibition in the *Queen's Bench*, between *Green* and *Balser*, the case was as follows; there was a religious college in *Maidstone*, to which the rectory of *Maidstone* was impropriate; and the college

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college had divers lands and tenements within the said parish of *Maidstone*, and all was given to the king by the statute of 1 E. 6. Afterwards the rectory was conveyed to the bishop of *Canterbury*, and the lands, parcel of the possession of the said college, were conveyed to the lord *Cobham*; and now the farmer of the lord *Cobham* brought a prohibition against *Balser*, farmer of the said rectory under *Whitgift*, archbishop of *Canterbury*, and alleged the branch of the statute of 31 H. 8. concerning discharge of tithes, and shewed, that the master of the said college was seised of the said lands, and of the said rectory, *simul et semel*, as well at the time of the making of the act of 31 H. 8. as of the making of the said act of 1 E. 6. and held them discharged of tithes, and shewed the said act of 1 E. 6. by which the said college was given to king E. 6.; whereupon the defendant demurred in law. And in this case divers questions were moved.

1. Whether the said college came to the king as well by the statute of 31 H. 8. as by the statute of 1 E. 6. for if this college came to the king by the statute of 31 H. 8. then without question the said branch of the said act concerning discharge of tithes, extends to it: and it was objected by the plaintiff's counsel, that the words of the said act are general, *sc. That all monasteries, &c. colleges, &c. which hereafter shall happen to be dissolved, &c. or by any other means come to the king's highness, &c. shall be vested, deemed, and judged by authority of this parliament in the very actual and real possession of the king, &c.* And when this college came to the king by the statute of 1 E. 6. it came to the king within these words of the act (*by any means*). But it was answered by the defendant's counsel, and resolved by the court, that that could not be, for several reasons.

1. When the statute speaks of dissolution, renouncing, relinquishing, forfeiture, giving up, &c. which are inferior means, by which such religious houses came to the king, then the said latter words (*or by any other means*) cannot be intended of an act of parliament; which is the highest manner of conveyance that can be; and therefore the makers of the act would have put that in the beginning, and not in the end, after other inferior conveyances, if they had intended to extend the act thereunto. But these words (*by any other means*) are to be so expounded, *scil.* by any other such inferior means. As it hath been adjudged, that bishops are not included within the statute of 13 *Eliz. cap.* 10. for the statute beginneth with colleges, deans and chapters, parsons, vicars, and concludes

cludes with these words, *and others having spiritual promotions*; these latter words do not include bishops, *causa qua supra*. So the statute of *West. 2. cap. 41.* the words of which are, *statuit rex, quod si abbates, priores, custodes hospital' et aliarum domorum religiosarum, &c.*; these latter words do not include bishops, as it is holden in *2 & 2 Phil. & Mar. Dyer 109.* for the cause aforesaid.

2. The said clause of *31 H. 8.* enacts, that the said religious houses shall be in the king by authority of the same act; and the statute of *1 E. 6.* enacts, that all colleges, &c. shall be by authority of this parliament adjudged and deemed in the actual and real possession of the king; so that the latter parliament being of as high a nature as the first was, and providing by express words that the colleges shall be, by authority of the said act, in the actual possession of the king, the said college cannot come to the king by the act of *31 H. 8.* It is said in *29 H. 8. parliament et statutes, Br. 73.* if lands be given to tenant in tail in fee, his issue cannot be remitted, for the latter act takes away the statute *de donis, &c.* 3. The usual form of pleading such possessions as came to the king by the statute of *1 E. 6.* and by the act of *31 H. 8.* doth manifest the law clearly, *scil.* to plead surrender or relinquishment, &c. *virtute cujus ac vigore* of the statute of *31 H. 8.* the king was seised; but to plead the act of *1 E. 6.* of chauntries, *virtute cujus ac vigore* of the statute of *31 H. 8.* was never heard or seen. And for all these causes it was resolved, that this college came to the king by the act of *1 E. 6.* and not by the act of *31 H. 8.*

The 2d question was, forasmuch as the said college came to the king by the act of *1 E. 6.* and not by the act of *31 H. 8.* Whether the said branch of discharge of tithes extends to such colleges as came to the king by any other act, and not by the act of *31 H. 8.* And it was objected, that the said branch should extend to colleges which came to the king by any other act: for it was said, that although the preamble of the said branch saith, *the late monasteries, &c.* yet this is not literally to be understood of monasteries only which were dissolved before the act, for (*late*) is to be construed according to the body of the act, *scil.* of those which were dissolved before, or which should come to the king afterwards by the said act; so that when they are dissolved, and in the king by force of this act, this act may call them (*late*) *quod fuit concessum per curiam*. Also, they said, that the words of the branch itself are general, *scil.* any monasteries, &c. colleges, &c. without any limitation; so that they conceived, that the words of the said branch

made

A college given to the crown by the statute of *1 E. 6.* is not entitled to an exemption from tithes under the *31 H. 8.*

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made for them, and that this clause of discharge should extend to all monasteries, &c. colleges, &c. *quæcunque*, by what means soever they came to the king; and they said, that the intent of the act was so, for the intent of the act was to benefit the king, and to make the subject more desirous of purchasing them, &c. Against which it was said by the defendant's counsel, and resolved by the court, that neither the words, nor the meaning of the said branch, did extend to any monasteries, &c. but to those only, which came to the king by the act of 31 H. 8. for it would be absurd, that the branch of the act of 31 H. 8. should extend to a future act of parliament, which the makers of the act of 31 H. 8. without the spirit of prophecy, could have no foreknowledge of; but this clause of discharge of tithes shall extend only to those possessions which came to the king by the same act. And where it was said, that the first words of the branch were general, the same is true; but the conclusion of that branch is, *in as large and ample manner as the late abbots, &c.* So that (*late*) being so intended, as it hath been agreed on the other side, *scil.* only of religious houses which came to the king by 31 H. 8. it is clear, that that branch cannot extend to this college, which came to the king by the act of 1 E. 6.

Qu. As to the general allegation of unity of possession.

The 3d question was, admitting that the said college had come to the king by the statute of 31 H. 8. whether such general allegation of unity of possession of the rectory, and of the lands in it, was sufficient. And it was resolved by the court, that it was not sufficient; for no unity of possession shall be sufficient within the same act, but a lawful and perpetual unity of possession, time out of mind, as it was adjudged *M. 34 and 35 Eliz.* in a prohibition between *Valentine Knightly* esquire, plaintiff, and *William Spencer* esquire, defendant, where the case was as follows: the plaintiff in the prohibition shewed, that *Philip Abbot*, of *Evesham*, and all his predecessors, time out of mind, were seised as well of the rectory impropriate of *Badby cum Newnam*, in the county of *Northampton*, as of the manor of *Badby cum Newnam*, in *Badby* aforesaid, in his demesne as of fee, in the right of his monastery, *simul & semel*, until the suppression of the same monastery; *quodque ratione inde*, the said abbot, and all his predecessors, until the dissolution of the same monastery had holden the said manor discharged from the payment of tithes, until the dissolution of the same house, and shewed the branch of the statute of 31 H. 8. concerning discharge from the payment of tithes, and conveyed the said manor to
Knightly,

Knightly, and the said rectory to *Spencer*, who libelled in the spiritual court for tithes of the demesnes of the said manor, against *Knightly*, who, upon the matter aforesaid, brought the prohibition; and it was adjudged, that the prohibition was maintainable; for the said branch of the act of 31 H. 8. was made to prevent two mischiefs; one, that otherwise all the impropriations of rectories to houses of religion had been disappropriate; for if the body to which the rectory is appropriated had been dissolved, the impropriation to such body had been dissolved also, as appears by 3 E. 3. 21 E. 14. 1. a. 21 H. 7. 4. b. F. N. B. 33. k. l. Another mischief was, that whereas many religious persons were discharged from the payment of tithes; some by their order, as the *Cistercians*, *Templars*, *Hospitallers* of St. *John's* of *Jerusalem*, as appears by 10 Eliz. Dyer 277; some by prescription, some by composition, some by the pope's bulls, &c.; and the greater part of religious houses, as the said abbey of *Evesham* was, were founded before the council of *Lateran*, and before time of memory; it would be infinite, and in a manner impossible by any search to find all the discharges and immunities which such religious houses had; and therefore also the said branch was made. And the great doubt in the said case was conceived upon this word (*discharge*); for it was said, that unity of possession was not any discharge of tithes, and by consequence was not such discharge as was within the intent of the said act. And for the force of this word (*discharge*) 18 E. 3. Bar. 247. 35 H. 6. 10. b. 22 E. 4. 40. b. and 6 H. 7. 10. b. were cited. But as to that, it was resolved by the court:

1. That the statute doth not say discharge of tithes, but discharge of payment of tithes.

2. The statute doth not say, discharge of payment of tithes absolutely, but as freely as the abbot, &c. held it at the day of dissolution; and then this word (*discharge*) being referred to a certain time, may be intended of a suspension by unity. As, if a man leased of a rent disseises the tenant of the land, and makes a feoffment with warranty, the feoffee shall vouch as of land discharged of the rent, and yet the rent was but suspended; but every suspension is a discharge for a time, and the discharge being referred to the time of the warranty, extends to the suspension. *Quod vide* 30 E. 3. 30. 3 H. 7. 4. a. 21 H. 7. 9. a. b. F. N. B. 135. e.

3. The statute saith, as freely as the abbot, &c. retained the same. And it was said, that it was the intent of the king, and of the makers of the act, to discharge the land of payment of tithes in

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such case of unity of possession, being a general case, to induce purchasers the rather to purchase the land for greater prices.

4. For the infinite impossibility, and the impossible infiniteness, as hath been said, all the discharges which such religious houses had, could not be known; and the same construction was made in this court, *Hil. 24 Eliz.* in a prohibition between *John Rose* and *William Gurling*, for tithes in *Flixton*, in the county of *Suffolk*.

Supra 136.

See 18 *Eliz. Dyer* 349. the parson of *Peykirk's* case. And it was likewise resolved in the said case of *Knightly*, that nothing could be traversed but the unity, for *ratione inde, &c.* is but the conclusion and the judgement of the law upon the precedent matter; but it was also resolved, that if before the dissolution the farmers of the demesnes had paid tithes, *&c.* to the abbot, *&c.* then the intendment of the law by the reason of the said unity of possession (which ought to be time out of mind) that the land was discharged of the payment of tithes, will not hold place. For as *Bracton* saith, *Stabitur presumptioni donec probetur in contrarium*. But, if the lands were always occupied by the abbots, or demised over, and no tithes at any time paid for the same before the act, although the land be conveyed to one, and the rectory to another, yet the land is discharged of the payment of tithes: and if the farmers of the demesnes had paid tithes before the act, the same should be pleaded by the defendant in the prohibition, and issue thereupon might be taken, as it was in the like case, *Trin. 38*

Infra 208.

Eliz. in this court, between *Edward Grevil* esquire, possessor of the demesnes of the manor of *Nafing*, in the county of *Essex*, plaintiff, and *Martin Trot*, proprietor of the rectory of *Nafing*, defendant; where, against such unity of possession in manner and form aforesaid, alleged by the plaintiff in the abbot of *Waltham*, and his predecessors, *&c.* in the rectory and demesnes, and with like conclusion as aforesaid, the defendant alleged payment of tithes by the farmers of the said demesnes, (without any traverse by the rule of the court), and issue was joined thereupon, and it was tried against *Trot*, and therefore the prohibition stood. And it was likewise resolved, That although the plaintiff in the case at bar alleged, that the master of the said college, at the time of the making of the said act of 1 *E. 6.* held them discharged of tithes; and although the lands of such religious persons may be discharged of tithes by prescription, as it hath been late adjudged in the case of one *Wright* in this court, or by composition, *&c.* yet such general allegation that he was discharged of tithes, was not sufficient, with-

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out shewing how he was discharged, either by prescription, composition, or other lawful means. But, if the land had come to the king by the statute of 31 H. 8. then, by force of the said branch of discharge of the payment of tithes, such general allegation, that such prior, &c. held the land at the time of the dissolution of the said priory discharged of the payment of tithes, without shewing how, had been sufficient, and so is the common use in prohibitions.

The fourth question in the case at bar was, whether any house which was ecclesiastical, and not religious, as bishops, deans and chapters, archdeacons, and the like, shall be within the act of 31 H. 8. for no house within the act of 31 H. 8. is said religious, but such as was regular, and consisted of such persons as had professed themselves, and vowed three things, that is to say, obedience, voluntary poverty, and perpetual chastity; and those are called in our law, dead persons in law. For after such profession their heirs shall have their lands, and their executors or administrators their goods, and that was called *mors civilis*: which was the reason that when a lease for life was made, the *habendum* always was, To have and to hold to him *durante vita sua naturali*; for it was then taken, that if the *habendum* had been *durante vita sua* (without saying *naturali*) the civil death, that is to say, the entry into religion had determined it. But it was resolved by the court, that no ecclesiastical house, if it be not religious, is within the act of 31 H. 8. for divers reasons.

1. The words of the act are always through the whole act in the copulative, *religious and ecclesiastical*; so that if it be ecclesiastical only, it is out of the act.

2. The makers of the act gave the king as well those religious and ecclesiastical houses which were dissolved, &c. as those which should be afterwards dissolved; but none were dissolved before the act, but only religious houses, and no house ecclesiastical only; for no bishoprick, deanery, archdeaconry, &c. or such like ecclesiastical and secular corporation, was dissolved before; therefore no ecclesiastical house which was not religious (which after the act shall be dissolved) was within the intent and meaning of the said act.

Thirdly, It is enacted by the statute of 31 H. 8. that all religious and ecclesiastical houses, which after shall be dissolved, &c. shall be in the actual possession of the king, in the same state and condition as they were at the time of the making of the said act,

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upon which clause of the statute it was adjudged, *Pasch. 5 Eliz. Rot. 129.* reported by serjeant *Bendloes*, and *Mic. 6 and 7 Eliz. Dyer 231.* and *Plow. Comm. 207*, that if an abbot after the said act grants the next avoidance of an advowson, or makes a lease for years, and afterwards surrenders, so that by the act, the possessions of the abbey ought to be in the king, in the same state and condition as they were at the time of the making of the act; and at the time of making the act the land and the advowson were discharged of all interests, for this reason it was adjudged in both cases, that the lease and the grant were void by the said act. But, if a dean and chapter, and other such ecclesiastical and secular corporations, should be within the said act, then, if they should surrender their possessions, they would avoid all their own grants and leases, which would be dangerous. And that was one principal reason that the colleges, chantries, &c. which came to the king by the acts of 37 H. 8. or 1 E. 6. should not vest in the king by the act of 31 H. 8. for the mischief before, for avoiding their leases, grants, &c. And to conclude this point, it was held in the common pleas in *Parret's case*, concerning the priory of *Fridefild*, that if the house be not religious and regular, it is not within the act of 31 H. 8.

And as to the opinion of 10 Eliz. *Dyer 280.* *Corbet's case*, concerning the priory of *Norwich*, it seems that that differs much from other deans and chapters, for the dean and chapter of *Norwich* were once religious, for they were prior and convent before; and yet that case was denied by *Popham*, chief justice, and some other of the judges, for the reasons and causes aforesaid.

Fifthly, It was holden by the court, that although it is provided by the statute of 1 E. 6. that the king shall have the lands of the colleges, &c. in as ample and large manner as the said priests, wardens, &c. had or enjoyed the same, that these general words should not discharge the land of any tithes, for they are not issuing out of land, but are things distinct from the land. For as the book is in 42 E. 3. 13. a. the prior shall have tithes of land against his own feoffment of the same land; and it is no good cause of prohibition to allege unity of possession in a college which came to the king by the statute of 1 E. 6. as a man may by the statute of 31 H. 8. in an abbot, prior, &c. as is aforesaid; for the statute of 1 E. 6. hath no such clause of discharge of payment of tithes, as the statute of 31 H. 8. hath. And therefore such perpetual unity, as hath been said before, will not serve upon this act of 1 E. 6.

E. 6. And afterwards a consultation was granted: and another consultation was granted the same term in another prohibition sued upon the same matter, between *Green* and *Buffken* (a). And *Lawrence*, *Tanfield*, and others, were of counsel with the plaintiff, and the attorney general and others with the defendant.

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M. 39 & 40 Eliz. A. D. 1597. B. R.

Blincoe v. Barkfdale, Vicar of *Marston*. [Cro. Eliz. 578.]

PROHIBITION: upon demurrer the case was as follows. A parsonage was appropriated in the time of king *Hen. 3.* to a priory, and at the same time a vicarage was endowed in these words: *salva vicaria, quæ confistit in alteragio, et in minutis decimis totius parochiæ prædictæ ad ecclesiam prædictam spectante. Et ulterius, si contigerit ipsos monachos in propriis usibus instauramenta habere infra parochiam prædictam; quod tunc ipsi a præstatione decimarum omnino immunes essent.* At the time of which appropriation, there were six yard lands of the parsonage's glebe within the same parish; which parsonage came by the statute of 31 *H. 8.* at the dissolution, (being then in the prior's hands discharged *de minutis decimis*,) to the said king in the same manner: and the king granted those six

A vicar under an endowment of all small tithes of the parish, is not entitled to the small tithes of the parson's glebe.
Cro. Eliz. 479.
Moore 457.
910. S. C.

(a) This case of *Green v. Buffken* is reported by *Moore*, under the name of *Green v. Boskin*, which report, as it materially differs in some parts from what my lord *Coke* has here stated as the unanimous resolution of the court, I have thought it proper to subjoin. After stating the case, *Moore* says, "Three points were conceived by the justices. 1. If the colleges should be now said to be given to the crown by 31 *H. 8.* or 1 *E. 6.* And all the justices were clear in opinion that the king has them by 1 *E. 6.* because that is the last statute, though there be no negative words in it (that is) that he should have them by that statute, and no other. The second was, if the king shall have the lands by 1 *E. 6.* and be discharged of tithes by 31 *H. 8.* so that he shall take the tithes by the first statute, and the lands by the last, because the last does not give the tithes, though it has words that the king should have the lands in as ample manner and form as the colleges; which words do not extend to tithes, but only to the estate in the land. And of this the justices doubted. It seemed to *Popham* and *Fenner*, that by the statute of 31 *H. 8.* he should hold the land discharged which he had by 1 *E. 6.* *Gawdy* *contra*. *Ideo quære*. The 3d point was, if unity, without composition or prescription, were a sufficient discharge of tithes by 31 *H. 8.* And they all agreed that it was. But *Gawdy* said, that there ought to be a unity of the parsonage and land in the religious persons from time whereof the memory of man runneth not, &c. before the dissolution. *Popham* and *Fenner* *contra*; for if there be a perpetual unity in fee of the rectory, and in fee of the land at the time of the dissolution, that is sufficient by the statute of 31 *H. 8.* and no consultation had ever been granted out of the king's bench upon a perpetual unity." *Moore* 420.

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(a) *Mare* adds, "Note also, that it ought to be ancient glebe at the time of the endowment."

it in their own hands. And they all held, as it was discharged from the payment of tithes in the hands of the priory at the time of the dissolution; so the plaintiff now, having the same part of land by letters patents from the king, shall be discharged by the statutes of 31 H. 8. and 32 H. 8. from the payment of tithes for ever after against the grantee of the parsonage, and all others, in regard it was discharged at the time of the dissolution. And *Popham* said; the difference would be, whether the discharge were by reason of the persons who were to pay tithes, as the order of *Cistercians*, &c., then the patentee should pay tithes: but, if the land were discharged from the payment of tithes by reason of a unity, it shall then be discharged by the statute in the hands of the patentee; for that privilege runs with the possession. Wherefore it was adjudged for the plaintiff.

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Land discharged of payment of tithe in an abbot's hand, at the time of the dissolution, is always discharged by 31 H. 8.

M. 39 & 40 Eliz. A. D. 1597. B. R.

Somerton v. Doctor Cotton, Parson of Finchley.

[Cro. Eliz. 587.]

IN a prohibition for tithes of wood, it was surmised, that within the parish there is a custom, that all the parsons of the said church, time whereof, &c. *habuerunt, et gavis fuerunt* such land, parcel of the manor of *Finchley*, in recompence of all tithe of wood within the said parish. And it was hereupon demurred. *Harris* serjeant, moved, that this prescription was not good: for the lands now in question, whereof tithes are demanded, were not averred to be parcel of the manor; and then the land, parcel of the manor, cannot be said to be a recompence for all the other lands within the parish, wherewith the lord of the manor hath nothing to do. *Popham*; it may be, that, at the beginning, all the land within the parish was parcel of the manor, and that then this allowance of the profits of this land was allotted in discharge of tithes of all the wood within the same parish; and, that, at the first, it was all the land of the allotter. Wherefore it was adjudged for the plaintiff, by the assent of all the justices. *Hill. 40. Placito 5.*

The parsons having land, parcel of the manor of D. in recompence of all tithe wood in the parish of D. is a good prescription in discharge.

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M. 39 & 40 Eliz. A. D. 1597. B. R.

Pigot v. Heron. [Moore 483.]

A custom for the lord of a manor to pay 6l. in satisfaction of all the tithes of the manor, and in consideration of such payment to take the tenth shock, &c. is good. Cro. Eliz. 599. S. C. by the name of *Pigot v. Heron*. Moore 589. S. C. cited.

IN an action of trover and conversion, the plaintiff declared, that he, 20 Octob. anno 36 reg. apud London, in warda de Cheap, *possessionat' fuit de 20 carectat' tritici in garbis, 40 carectat' fleginis in garbis, 20 carectat' hordei in cocks, 40 carectat' avenarum pro decimis a novem partibus separatis et ejed' granorum in Hurley infra parochiam de Ovingham in comitatu Northumb. ut de bonis suis propriis, et sic possessionat' 21 Octob. anno 36 casualitèr amisit apud London et eodem die devener' per invent' ad manus defend', qui sciens, &c. in usum proprium disposuit 22 Octob.*

The defendant pleaded in bar, that the king and queen Philip and Mary, *seisit' de manerio de Prudehowe infra parochiam de Ovingham in comitatu Northumb. in fee in jure coronæ, et villat' de Harley existent' infra manerium de Prudehowe; infra villatis de Prudehowe et Harley infra manerium illud habetur consuetudo et modus decimandi (scil.) quod domini manerii consueverunt solvere rectori ecclesiæ de Ovingham aut ejus deputat' sive firmar' annuatim ad festum Sancti Mich. vel postea super requisitionem sex libras apud ecclesiam de Ovingham in plenam satisfactionem et exonerationem omnium decimarum granorum infra villat' de Prudehowe et Harley, quas sex libras rectum acceptaverunt per totum tempus, &c. in satisfactionem omnium decimarum granorum, &c. Et ulterius, quod domini manerii per totum tempus consueverunt capere decimam garbam et cumulum granorum infra villat' prædict' crescen' in satisfactionem solutionis dict' 6 lib.* The plea then conveyed the manor to the now earl of Northumberland, by patent and descent, and by the same patent the tithes, by the name of all hereditaments in *Prudehowe, Ovingham, Harley, &c.* and there was an averment, that the earl had paid the 6l. annually to the farmers of the rectory, and *paratus fuit in festo Sancti Mich. ultimo ad solvend' et adhuc paratus est;* and that the tithes being severed, the earl was possessed thereof until one *Halfoe* took them, from whom *Heron*, as the servant of the earl, took them, and was so possessed thereof until the earl at *London* gave them to him, which is *eadem invent'*; and then there was an averment that *Harley* in the declaration, and the vill of *Harley* in the plea, and *Hirlaw*, otherwise *Harlaw*, in the letters patent, are all one.

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The plaintiff replied, that he was seised in fee of the rectory before the tithes came to the hands of *Heron* the defendant, and being so seised, the tithes were severed from the nine parts, whereby he was possessed of them as of his proper goods, until the earl took them out of his possession at *Harley*, and that the earl was possessed thereof until *Halfoe* took them from him; and that *Halfoe* being so in possession gave them at *London* to *Pigot*, whereby he was possessed of them *ut de bonis propriis in priori jure*, and being so possessed 21 Octob. anno 36, casually lost them, whereby they came by finding to the hands of *Heron*, who converted them 22 Octob. whereupon he prayed judgement without any traverse. And upon this the case was argued, *East. 40 Eliz.* by *Lawrence Hyde* for the plaintiff, and *Francis Moore* for the defendant.

Hyde argued that the plea in bar was insufficient; because both of the prescriptions by which the defendant makes title to the corn are against reason and law. For as to the first; it is against reason and law, that one man should make a satisfaction to the parson for the tithes of another man; because the law charges the land and the occupier of the land with the tithes, and he who has not the land and is not in the occupation of it, cannot in reason pay the tithes of the land, and, consequently, cannot prescribe to pay a satisfaction for the tithes of it: wherefore he concluded, that the first prescription, that is, that the lord of the manor hath used to pay 6 l. to the parson for the tithes of corn and grain within the whole manor, is against law and reason, he being occupier and tenant of only part of the land, and his free tenants of the other parts. The second prescription he took to be more unjust and against reason, that is, that the lord of the manor prescribes to take in consideration of his 6 l. the tithes of all the corn and grain within the manor: for tithes are due only to spiritual persons, and a layman who cannot administer the sacraments and perform the functions of a minister is not capable of tithes; and for this he vouched several texts of the ecclesiastical law and canons of the church, and therefore concluded the bar insufficient.

Moore e contra; and he maintained both the prescriptions as they were alleged in the bar. As to the first, he said, that a prescription is a thing the commencement of which is before time of memory, and is unknown; yet if any reasonable intendment can be made of its commencement, the prescription is good. And it seemed to him that the commencement of this prescription is founded

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founded in reason ; for the prescription is, that the lord of the manor hath used to pay 6 l. in satisfaction of all the tithes of corn and grain within the manor ; which is reasonable ; for it may be intended, that when this manner of tithing began, all the land of the manor was in the hands of the lord in demesne before the grant of any freeholds or copyholds, in which case it was reasonable that he might pay money in satisfaction of all the tithes of corn and grain within the manor ; and if so, then the land, and all the occupiers of it thereafter, should be discharged of all other tithe of the land into whose hands soever the land should come. As to the other prescription, it seemed also to be reasonable that the lord of the manor should, in consideration that he satisfied the parson for the tithes of the whole manor, take the tenth part of the corn from the other tenants within the manor : and in this respect the words of the plea are mistaken ; for the prescription is not, that the lord of the manor hath had the *tithes* of all the corn and grain, but *decimam garbam et decimum cumulum*, which he may take as a temporal custom within his manor. For one may reserve by way of rent *decimam garbum*, or *quintam garbam*, or *medietat' granorum*, as 44 E. 3. fol. and if it may be good by way of reservation, it is also good by way of custom : as a heriot may be reserved and may be due by custom. And many much stricter customs between the lord and his tenants are allowed in our books : as 8 H. 3. *Fitzb. Prescriptions*, pl. 58. the church of *Hereford* prescribed to have the wardship of their socage tenants. And 15 E. 3. *Fitzb. Aide*, 33. the lord prescribes in lieu of marchet-service to have a fine when his tenant married his daughter. In 8 R. 2. pl. 117. *Aide de Roy*, in *Fitzb.* the lord prescribes that he hath used to distrain for a satisfaction if any one erected a fold within the vill, though it were not upon the lord's land. So 11 H. 7. fol. the lord prescribes to have 3 l. for a pound-breach within the manor. The lord, therefore, may likewise prescribe in the principal case to have *decimam garbam et decimum cumulum*. But it seems, that though the second prescription should not be good, yet the plea in bar is well enough, and judgement ought to be given against the plaintiff. For the first prescription is sufficient to bar the parson of all tithes within the manor ; and therefore the tenants are discharged against the parson ; and when they set out the tenth part of their grain, the property remains in themselves, and it is not due to the parson ; then neither the parson, nor the lord of the manor, hath any right to this corn : and if so, it is to be seen and

and inquired which of the persons in question was first possessed of the corn, for he might detain it against the other, and if the other took it from him, he committed a tort: and therefore the plea is to be examined to this point; and by the plea it appears that the earl of Northumberland was possessed until *Halfoe* took them from him, and that *Heron*, the defendant, took them by the earl's order, and the earl then gave them to him. Which plea is confessed by the replication and demurrer; for if this were not true, the plaintiff ought in his replication to have traversed *absque hoc*, that the earl was first possessed, so that judgement ought to be against the plaintiff.

And all the justices were unanimous that both the prescriptions were good (a). They agreed also, that the first possession was confessed by the replication without any traverse to be in the earl of Northumberland, under whom the defendant claimed. And they also agreed, that the last prescription was not material, but that the first was a sufficient title for the earl. For which reasons they entered judgement against the plaintiff, if better cause should not be shewn before a certain day: at which day *Coke*, attorney, argued for the plaintiff; and *Tanfield* for the defendant. And *Coke* advanced nothing but this, that the defendant ought to have said in his plea in bar that the lord of the manor hath used to take *decimam garbam*, as appurtenant to his manor. But the whole court was against him; for the prescription in gross is well enough. He then prayed a further day to argue against the patent, for it seemed to him that it did not pass by the patent, *et ei conceditur*, so that it is now pending. But afterwards, *M. 40 & 41*, (b) it

(a) The judgement of the court is given more fully by *Croke*. As to the first prescription it runs pretty much in the words of Sir Francis Moore, the defendant's counsel. As to the other, he says, that it was the opinion of the court, "that it was good to have the tenth shock, &c. for he hath it as a profit *appendre*, as parcel, or a thing appurtenant to his manor, and not as tithes. For a layman cannot have tithes by prescription, because he is not capable of them, in regard they are spiritual: but he may have the tenth shock as a temporal profit *appendre*, as in 44 *E. 3. 5*. And it well may be parcel of a manor: otherwise of tithes, which cannot be said to be parcel of or appendant to a manor, as was adjudged in *Winc's case*, 34 *Eliz.* and so is the book of 10 *E. 3. 5*. And therefore, if the lord had prescribed to have *decimas garbarum*, it had been ill; but, when he prescribes to have *decimam garbum*, &c. it is otherwise; for so there is a difference between the pleading for tithes, which are spiritual, and of a tenth, which is temporal." *Cro. Eliz.* 599.

(b) We find a report of this same case, as it should seem, under the name of *Pigot v. Simpson*, so late as Trinity Term, 42 *Eliz.* in *Cro. Eliz.* 763. when the court adhered to their former opinion upon both of the principal points.

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was adjudged for the defendant that the plaintiff *nihil capiat per breve vel billam*, for the reasons aforesaid. And note, it was affirmed in this case that the king is *persona mixta*, and capable of tithes in pernaney by prescription, or in *non decimando*. 22 Aff. pl. 75. 33 E. 3. Fitzh. Aide de Roy, 103. & 10 H. 7. 10.

M. 39 & 40 Eliz. A.D. 1597. B. R.

Goodale v. Butler *. [Cro. Eliz. 590.]

If residing
in another
house in the
parish than
the parson-
age house
be non-resi-
dence, by
21 H. 8.
c. 13. Qu.
Moore 540.
6 Co. 21 b.
Gouldsb.
169. S. C.

INFORMATION upon the statute 21 H. 8. c. 13. of non-residency. The defendant pleaded not guilty: and a special verdict was found; that the defendant was parson of *Downham* in *Norfolk*, and had a parsonage house and glebe land within the parish: but he inhabited not therein, but in a copyhold tenement, which he had in right of his wife in the said parish; and he always served the cure, and, whether this were a non-residency within the statute, was the question. And, after argument by *Tanfield* for the plaintiff, and *Athoe* for the defendant, the justices delivered their reasons severally. And *Gawdy* and *Popham* held, that it was not a residence according to the statute, which was made for three causes. First, that the cure should be served. Secondly, that the poor should be fed. Thirdly, that the parsonage house should be upholden and maintained; which last cannot be, if the incumbent do not inhabit it. And, if the statute should be otherwise construed, many inconveniencies would ensue. For parsons would purchase other houses within their parishes, and be always resident upon them, and suffer their parsonage houses to decay, and sterilize their glebe land, and meliorate their own possessions in prejudice of their successors. And as *Gawdy* said, the statute, which saith, that he shall be resident upon the benefice, shall be intended where there can be a residency. For he cannot be resident upon the tithes, nor upon the glebe land, where there is not any house: but his habitation is only within his parsonage house. *Clinch*, and

* It appears from *Gouldsbrough's* report of the special verdict, that the defendant had demised the parsonage house, reserving a chamber. *Gouldsbrough* and *Moore* also state that the lessee of the parsonage resided in it, and kept hospitality there: it was found too according to the former, that the defendant kept hospitality in the house in which he then lived, and was always dwelling there. Lord Coke treats the question as decided against the defendant; but the other three reporters state the court to be equally divided.

Fenner e contra. For they held, that, if he be resident within his benefice (which extends to the whole parish) it is sufficient: but, if he be resident upon any other house adjoining to his parish, but not within his parish, although he every Sunday, and holiday, serve the cure, yet it is not sufficient, as it was adjudged here in *Brown and Hudson's* case, 33 *Eliz.* And they said, that the intent of the statute for his residency is, that he should *pascere gregem cibo, exemplo & verbo*, all which he may do, when he is resident in any part of the parish. And the statute is in the disjunctive, *viz.* in, at, or upon his benefice. *Et in disjunctivis sufficit unum esse verum.* And it is clear, that all the parish is his benefice: so he is resident in his benefice. But peradventure he is not resident upon his benefice, unless he inhabits within the parsonage house, (but note, the statute is in the copulative, in, at, and upon his benefice). The statute also cannot intend residency upon the parsonage house: for there be divers parsonages which have not any parsonage house. But it may be aliened by the former parson, with the consent of his patron and ordinary, or let out, so as his successor cannot have it: and therefore his residency may be in any other house within the parish. Wherefore, &c. And *Fenner* said, that the lord *Anderson* was clear of his opinion; that it is a sufficient residence, if he inhabits within any part of the parish. *Et adjournatur.*

P. 40 *Eliz.* A. D. 1598. B. R.

Leigh v. Wood *.

PROHIBITION to stay a suit for tithes, wherein it was surmised, that the plaintiff set forth his tithes, and afterwards, for some reasonable causes (not shewing what in certain) he had detained part of them; and that the parson had sued him for them in court christian: and it was thereupon demurred. And *Fenner* and *Clinch* held it to be good cause for a prohibition. For, by setting out the tithes, they are become lay chattels, for which he may have his remedy at the common law by trespass, or detinue, and therefore there is not any cause of suit in the court christian. *Gawdy* and *Popham e contra.* For against the party himself, who set forth his

Qu. If for detaining tithes by the owner, after he set them forth, suit lies in the court christian.

**Moore*, in his account of this case, treats it as agreed by the court, that the suit should be in the spiritual court. *Moore*, 912. pl. 1207.

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tithes, a suit is well maintainable in the spiritual court, if he detains them, although the parson (if he would) might have his remedy at the common law. But, if a stranger takes them after they be set forth, his remedy is only at the common law. And the statute of 32 H. 8. proves it. For the words thereof be, *If any do not set out, or do detain, or withhold his tithes*, (which is to be intended after they are set out), *he shall be sued in the court christian, &c.* For otherwise mischief would ensue to the parson, in that he would secretly set his tithes forth, so as the parson should not know thereof, and would afterwards carry them away. *Et adjournatur.*

P. 40 Eliz. A. D. 1598. B. R.

Beadle v. Sherman. [Cro. Eliz. 608.]

Debt upon the statute for the treble value lies in the common law courts for not setting out tithes.

Moore 912.
S. C.
Jenk. 279.
S. C.
13 Co. 47.
S. C.

DEBT upon the statute 2 Ed. 6. for not setting forth tithes, wherein the plaintiff declares, that he was parson of *Lytlington*, in the county of *Cambridge*, and that the defendant was a parishioner there, and had corn there growing, &c. the tithes whereof amounting to the value of 50 l. he had not set forth: wherefore he demanded the treble value, viz. 150 l. After verdict for the plaintiff, upon a *nihil debet* pleaded, it was moved in arrest of judgement, that the suit for this treble value ought not to be brought at the common law, but in the spiritual court, as it ought to be for the tithes before they are set forth. But *Tanfield* for the plaintiff moved, that it might be well brought at the common law. And so it was ruled in the exchequer, upon great advice, in the time of *Mamwood*, betwixt one *Wood* and *Halton*. For there the information was brought by the queen only upon this statute, and the treble value was demanded, and adjudged that it lay not: for the statute gives it to the party grieved, and not to the queen. And then it was brought by *Wood*, being the party grieved, and he had judgement to recover. And a precedent in this court, *Hil. 34 Eliz. Ret. 682.* betwixt *Wentworth* and *Crisp*, (a) was cited, where such an action was brought, and the plaintiff had judgement to recover. And all the justices were of the same opinion in this case: but, because it was a new case, they would advise until next term.

(a) Moore 912. pl. 1289. S. C. This action too was by baron and feme in right of the feme.

The case was moved again, [Tr. 40 Eliz.] to have the resolution of the court: and they all resolved, that the action well lay upon the statute. It was then moved, that those tithes were personal chattels, which appertained to the baron only (*a*), and he hath joined his feme with him in this action; and therefore it was ill. *Sed non allocatur*: for, the feme being termor, the baron is possessed of them in her right; and the action is given to the proprietor, or farmer, &c. wherefore the action is well brought in both their names. And it was adjudged for the plaintiff. Note; that a writ of error was brought upon this judgement. And the error was assigned in the point of law. And the judgement was affirmed.

M. 40 Eliz. A. D. 1598. B. R.

Barfdale v. Smith. [Cro. Eliz. 633.]

TRESPASS by a vicar, for taking two loads of hay, and carrying it away. The defendant pleads, that the place where, &c. is within the parish of *Maidstone*, whereof he is parson impropriate; and it was set out for tithes: and, that he used to have *decimas garbarum, & fœni*. The plaintiff replies, and shews a composition in the time of king *Henry 3.* and that the vicarage was then endowed; which was, that the vicar should have *minutas decimas, & totam decimam garbarum* in *Watworth*, (which was an hamlet within the said parish, and the place where, &c. and was parcel of that hamlet), and, that at all times, whereof, &c. he, and his predecessors (vicars there) had used to have the tithe of hay there; wherefore, &c. And it was hereupon demurred. *Tanfield*; by this prescription, he cannot have hay. For *garba* is always corn, and therefore this prescription cannot stand with the composition. *Coke e contra*: for as the usage hath been, so it shall be expounded. For it was adjudged in the exchequer, where a patent was made by king *John* to one and his successors, that because *Bracton* saith, that anciently *successor* was taken for *hæres*, and that always since it had used to descend *jure hæreditario*, the heir should have it by that charter. Wherefore, &c. And all the court here resolved accordingly; for, in regard it was an ancient charter,

The tithe of hay shall belong to the vicar where he is endowed with *decimam garbarum*, if the usage has been so.

(*a*) *Jenkins* states the action as brought by the husband only, and yet held good.

1598. and constantly had been used to extend to hay, the word *garbe* might well extend thereto, although at this day it is commonly used in another sense. Wherefore it was adjudged for the plaintiff.

M. 40 & 41 Eliz. A. D. 1598. B. R.

Chambers v. Hanbury. [Moore 527.]

Unity of possession does not destroy a modus, for the retainer is payment. Supra 98.

ON a trial at bar in prohibition, the suggestion was, that the queen and all those whose estate she hath, have used to pay to the rector of *Kingwood* 2s. 4d. yearly in satisfaction of all the tithes of certain land, called *Cowley in Kingwood*, in the county of *Wilts*, upon which prescription the issue to be tried was taken. Upon the evidence it appeared, that the queen had the estate of the abbot of *Kingwood*, who was owner of the land, and also rector in fee in right of his abbey, whence it was inferred by *Williams* serjeant and *Francis Moore*, that the prescription was not proved on the part of the plaintiff, inasmuch as the abbot could not pay himself, nor can the queen, who has now the estate of the abbot: but the prescription ought to have been stated in this manner; that is, that when the queen demised the land, the occupiers had used to pay 2s. 4d. in satisfaction of the tithes. *Sed curia, viz. Popham, Clench, and Fenner, contra eos*; for they were clear that unity of possession is not a perpetual discharge of the tithes, nor of the recompence in lieu of them; and if so, then the retainer may be said to be a payment to himself. And accordingly, under this direction, the jury found for the plaintiff.

M. 40 & 41 Eliz. A. D. 1598. B. R.

Benton v. Trot. [Moore 528.]

An abbot seised of a rectory and manor within it, demised both to one person, who afterwards demised a part of the lands of the manor to a sub-tenant, in whose

IN prohibition, the suggestion was, that the abbot of *Waltham Holycreft*, from time whereof the memory, &c. before the dissolution, and *Robert* the abbot, at the time of the dissolution, were seised in their demesne as of fee of the manor of *Nafing*, and of the rectory of *Nafing*, *insimul et semel*; and that by reason of the premises, they held the manor discharged of tithes: that the abbot surrendered to the king, whereby, and by the statute of dissolution, 32 H. 8. the king also held it discharged, for by that statute the king and his successors, and all others who should have abbey lands,

lands, should have, hold, retain, keep, and enjoy them discharged of payment of tithes, as freely and in as ample manner and form as the abbots held and occupied them at the days of their dissolution, or coming to the king's highness: the plaintiff then stated, that by another act in the same parliament, no one shall be compelled to pay tithes for any lands which by the laws or statutes of the realm are discharged, or not chargeable with the payment of any such tithes: and so he deduced the manor by conveyance of the inheritance and rectory to sir Edward Denny knight; but the manor was in jointure to his mother for life, who was married to Grevil, and the rectory was in lease to Trot the defendant, upon the demise of sir Edward Denny; and he pleaded a lease made by Grevil to him of the closes, called Great Priestfields and Little Priestfields, being parcel of the manor, and complained that Trot sued him in the spiritual court for the tithes of those closes: and he alleged further the statute of 2 and 3 E. 6. that no one shall be compelled to pay tithes for any land discharged by the laws and statutes of this realm by lawful prescription, or composition real, or not chargeable with the payment of any such tithes.

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occupation they were at the time of the dissolution in 31 H. 8. and had been for four years, and had, during that period, paid tithes: it seems that these lands are not exempt from the payment of tithes by unity.

Trot, the defendant, pleaded in bar, confessing the unity of inheritance, and that the abbot before and at the dissolution, held all such parcels of the manor as he held in his own hands discharged of the payment of tithes: but he pleaded further a lease made 7 H. 8. of the manor and rectory by the abbot to sir Thomas Par, who died in 8 H. 8. possessed of that term, which was for thirty years, whereupon Matilda his widow became possessed of it as executrix; and she, 29 H. 8. before the dissolution, demised the closes to Gouch and Shelley for four years, who before the dissolution paid the tithes in kind of the closes to Matilda, as farmer of the rectory, and they in 30 H. 8. before the dissolution, and at the time of the dissolution, paid the tithes in kind to the lord Cromwell, to whom Matilda had assigned her term: he then pleaded his own lease and the dissolution, as the plaintiff had alleged; and traversed, that without this, Robert the abbot held the closes discharged of the payment of tithes at the time of the dissolution as, &c. To which plea the plaintiff demurred: and it was argued by Forster and Coke, attorney, with the plaintiff; and by Francis Moore and Tansfeld, with the defendant.

The plaintiff's counsel made two objections to the plea, the one as to the matter, the other as to the form. As to the matter, that the plea admits unity in the freehold and inheritance of the rectory and the manor in the abbot at the time of the dissolution, and the

division

four years of the closes whereof the
 reverance not made by the abbot,
 he had the manor and rectory in lease.
 H. 8. enacts, that all others shall hold
 leases in such manner as the abbot held
 and the reversion discharged; they thought
 determined, the parties who now hold the
 discharged, for the abbot must have retained it
 the expiration of the lease. The objection as to
 the traverse, for it seemed to them that the tra-
 verses, inasmuch as the unity is in manner confessed,
 by the lease *in esse* at the dissolution, so that there
 to traverse the discharge. And if the traverse be ne-
 as it is made, it is not good; for it is *absque hoc* that
 and discharged of tithes at the time of the dissolution,
 matter in law and not matter in fact.

The defendant's counsel maintained the plea, notwithstanding
 the objections. And as to the objection to the matter, they con-
 sidered neither by the words nor by the intent of the statute of
 E. S. was any unity a discharge of tithes, except unity of the
 manor and rectory in the abbot in his occupation together at the day
 of the dissolution. And for the better understanding of the law in
 this point, it is to be considered how tithes at the first began; and
 next, how many manners of discharge of tithes there were at the
 common law before the statute; and thirdly, the words and intent
 of the statute as to unity being a discharge under it. First then, by
 the law of God, the laity were commanded to give a portion of
 their substance to spiritual persons for the exercise of their func-
 tions, as appears in the sixth chapter of *St. Paul* to the *Galatians*.
Let him that is instructed in spiritual things depart of his goods to
him that instructeth him. Now what part or portion he should de-
 part with was uncertain, until the church apportioned it after the
 example of the priests of the old law, who used to give the tenth
 part, as appears by the judicials of the jews, which was founded
 upon the vow of *Jacob*, in the 28th chapter of *Genesis*, that if God
 prospered him in his journey, he would give the tenth part of all
 he had, as the *Doctor and Student* writes in the last chapter. And
 after that the portion to be given was certainly known to be the
 tenth part, yet the person to whom it was to be given, was uncer-
 tain. And every temporal person might have given his tithes to
 any spiritual person whomsoever, having cure of souls, he pleased,
 before

before the council of *Lateran*; and thence it happened, that several portions of tithes issuing out of land within different parishes were found in the inheritance of religious houses, as being given to them before that council. But that council restrains men from giving the tithes to any other than the parson of the parish within which they arise (the kingdom being divided into parishes), and thence it followed, that the ecclesiastical law gives suit against him who detains tithes from the parson of the church. But from this it manifestly appears, that tithes were from the beginning merely spiritual, and that no layman was capable of them. And to this purpose is 13 *H. 3. Fitzh. Prohibition, pl. 20.* If a parson sell his tithes for money, he shall sue for the money in court christian. And 3 *E. 3. Fitzh. Grants, pl. 70.* an appropriation of a parsonage to the templars is not grantable over to the hospitallers, as *Herle* says there, because the privilege of retaining tithes to their own use was annexed in confidence to their persons by the ordinary who made the appropriation, and is not transferable by grant from the one to the other, as temporal things are; for which reason an act of parliament was made to transfer these things to the hospitallers in the 17 of *E. 2.* as it appears. And in 44 *E. 3. 5.* it is ruled, that an assise does not lie for tithes, but that if the lord has reserved the *tenth part* of the corn or such thing, he shall have an assise of that, as of a profit *apprendre*. So in 7 *E. 6.* it appears from *Dyer* 83. [*supra* 119.] that no temporal action lay for tithes, until the statute of 31 *H. 8.* gave them after the dissolution, and that the appropriated rectories and portions of tithes were given to the crown. Whereby it is proved, that though the abbots had temporal capacities to take land, and also spiritual capacities to take tithes, and though they had sometimes the inheritance in the land, and also the inheritance in the tithes which proceeded from that same land, yet those two inheritances were divided in them in respect of their several capacities *ac se essent in diversis personis*.

As to the discharge of tithes, there were three manners of discharge at common law. The first was prescription: the second, privilege: the third, unity. The discharge by prescription was *in non decimando*, and *in modo decimandi*. Spiritual persons only could prescribe *in non decimando*, and not temporal persons, unless for lands which they held as farmers to spiritual persons. And for this is the case of *Wright v. Wright*, in prohibition, *Hil. 38 Eliz. Rot. 628.* in the king's bench, [*supra* 167.] where the suggestion was, that the land was of the possessions of the bishop of *Win-*

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words in the text: the nearest to it is that of the edition of 1608.

Vide *supra* 106-7.

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chester; and the plaintiff prescribed that neither the bishop, his tenants, nor farmers, had ever paid any tithes for it from time immemorial; and adjudged a good prescription. So, the parson of a church may prescribe for his glebe in another parish. And so of all abbies and religious houses; for, because they were capable of tithes, they were capable of being discharged of tithes in their own land, and the commencement of the discharge is not examinable when there hath been a continual discharge from time immemorial, but it shall be intended to begin upon a reasonable cause. But this kind of prescription is not alleged in the prescription in the principal case; for it is alleged that the abbot was parson and proprietor of the land from time whereof the memory, &c. and that by reason of the premises he held the land discharged of the payment of tithes, &c. by which conclusion it appears that the reason and commencement of the discharge is unity; and against the plea of the party no other discharge can be intended or presumed, as it might be if it had alleged the prescription *in non decimando* without such conclusion. The prescription *in modo decimandi* is common to spiritual and temporal persons; and if land discharged *per modum decimandi* fall into the inheritance of a rector *in jure ecclesie*, this does not interrupt the prescription, but the retainer of what is due for the tithes shall be said to be a payment to the rector himself in order to continue the prescription in whose hands soever the land shall afterwards come upon its disjunction from the rectory, as was resolved upon evidence at bar in a prohibition in the case of *Chambers v. Hanbury*, [*supra* 208.] The discharge by privilege is, where the pope, who formerly usurped the privilege of supreme ordinary, by bull granted the privilege of being discharged from the payment of tithes; but this was always to be made to a spiritual person who could take the cure of souls: as in 10 *Edw. Dyr.* 277 b. [*supra* 132.] the bull to the religious of the order of Cistercians privileged them that they should not pay tithes of the lands *quas propriis manibus excoluerunt*: and yet their lessees and farmers paid them. And many discharges were under such privileges in conditions and provisions contained in the bulls. The discharge by unity is more properly a suspension than a discharge; for the unity is of the land in a temporal capacity, and of the tithes in a spiritual capacity, both of equal estate of inheritance in one person, so that it is a discharge for the time of the payment of tithes from the necessity of reason, because he cannot pay tithes to himself; but, when the land is come into the hands of one, and the right to the

the tithes into the hands of another, in that case the necessity is removed, and the tithes are payable for the land. And the conjunction of both the inheritances in one person was not any perpetual discharge, because the capacities in which he took them were several, so that the spiritual thing could not extinguish in the temporal, as it would be of things temporal, such as rents, commons, profits *apprendre*, and the like. And this is proved by 30 H. 8. Dy. 43. where it is resolved by the justices and all the serjeants, that if a parson purchase land within the parish, and demise it for years, or make a feoffment of it, he shall have the tithes from his own lessee or feoffee. So, he shall for such land pay tithes to his farmer of the rectory, if he demises the rectory, and retains the land in his own hands. And according to this is 7 E. 6. Bro. *Dismes* 17.—We are now to consider the statute of 31 H. 8. the intent of which was founded upon this providence, *viz.* that as the legislature had now given to the king the lands of the religious persons, and the king could dispose of them to his temporal subjects, who were not capable of tithes, nor of such discharges of the tithes of lands, as the abbots had enjoyed; in order to avoid contention, and to encourage the purchasers of abbey lands, they were desirous of providing that the king, and all other persons who should have any abbey land, should hold it discharged from the payment of tithes in like manner as the abbots held it at the day of the dissolution; and according to this intent they inserted the said branch of discharge of tithes in the said statute of 31 H. 8. of the dissolution of monasteries: by which it is clear both in the letter and the intent that all lands which the abbots held discharged by the privilege of any bull, or by any manner of prescription, the king and every other person should hold for ever discharged according to the privilege and prescription: and also that where the abbots held at the time of the dissolution any land in their hands discharged of tithes by reason that they themselves were the persons to whom the tithes were payable, there the king and every other person should hold those lands discharged for ever, if the abbot had an equal estate in the land and tithes; and this by the words of the statute, *that they should retain and keep the land discharged as freely as the abbot, &c.* But, if the abbot were out of possession of the rectory or of the land at the time of the dissolution, so that tithes were then paid; then the land was not discharged at the dissolution, and therefore shall pay tithes perpetually. For where there is no discharge but unity, there the unity must be of the occupation

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of both together, and no other unity of estate was any discharge at common law, neither at the time nor before the dissolution, as is proved by the cases before cited, and is also expounded by the whole usage and experience since the statute, as appears from the case of copyholders of abbey lands where the abbots were also parsons; there, there was unity in the estate of freehold of the rectory and also of the copyholds, and yet the copyholders have always paid tithes since the statute: whence it should seem that unity of the freehold and inheritance without unity of the occupation of the land and rectory in the abbot in the principal case, is not such a discharge of tithes as is within the intent or letter of the statute. And if he who was lessee for years of both under the abbot, that is, of the land and rectory, had not leased out the land, it would be a great question if that land by such unity in the hands of the lessee for years should pay tithes. For the words of the statute are, that the king and his patentees shall hold them discharged as freely as the abbot held them the day of the dissolution; and if the abbot did not hold the land and rectory together in his occupation, he did not hold the land discharged of tithes at all: and whether the holding of his farmer shall be said to be within the statute as if he had held them himself is doubtful. But here the case is stronger, because the farmer had leased out the land and retained the rectory, and he took the tithes of the land at the time of the dissolution from the lessee of the land in right of the rectory, so that the land was neither then discharged, nor did the abbot then hold it; wherefore, &c. As to the matter of form, the traverse seemed to them to be good: 1st. because in the whole suggestion there is but one thing material and traversable, and that is the discharge at the time of the dissolution; and upon that the prohibition is founded, and therefore the defendant has traversed it. For if he were to traverse the discharge before the dissolution by unity time immemorial, that is not material, because admitting the unity time immemorial, it is not material if there was no unity at the dissolution: and if he were to traverse the unity in seisin at the time of the dissolution, that is, that the abbot was not seised of the land and rectory at the time of the dissolution, this would pass against him, because he was seised of an estate of freehold and inheritance in both. And therefore the defendant hath done well to confess such seisin, and to shew a severance in occupation, and that the land was out of the hands of the abbot by lease for years at the time of the dissolution.

Fenner,

C A S E S.

Fenner, puisne justice, was with the defendant in both points, viz. the matter in law and the traverse. *Gawdy* was with the plaintiff in both points. *Clench* and *Popham* were with the defendant as to the matter in law, and with the plaintiff for the insufficiency of the traverse. And *Popham* said, that unity of estate, and not of occupation at the day of the dissolution by the abbot, is no discharge of tithes within the statute. But, if the abbot at the time of the dissolution held the land in fee, and the rectory likewise, this land is always discharged; and this construction has been always made in this court upon the words of the statute, that the king *shall retain and keep the land as freely discharged, as the abbot held it the day of the dissolution*. And so it was ruled in the case of *Knightley v. Spencer*, [*supra* 192.] and in another case between *Green* and *Boskein*, [*supra* 197.] and so also it was taken by the justices of the common bench. But as to the case of copyholders, he took it to be clear that they shall not be discharged; and if the abbey land were in lease for a year, or otherwise, at the time of the dissolution, and not in the proper manurance of the abbot, that land is not discharged by the unity of the freehold in him. And as to the traverse, he said that it is the matter in law which is traversed, whereas nothing is traversable but matter in fact: for the matter in fact is the unity, and the conclusion upon that is *by reason whereof* the abbot held discharged. And the traverse of the discharge is the traverse of the conclusion, whereas it should be of the unity, which is the matter in fact; and he confessed that unity from time immemorial, before the dissolution, is not material, but unity at the time: and if an abbot had purchased land and a rectory the very instant before the dissolution, and was seised of both in demesne and occupation at the time of the dissolution, he said that that land will always be discharged of tithes. And in the principal case it seems that the special matter would well enough have maintained the issue for the defendant against unity of seisin.

M. 41 Eliz. A. D. 1598. B. R.

Green v. Hun. [Cro. Eliz. 702.]

IN prohibition for suing for tithes of the rakings of barley, the plaintiff alleged a prescription to make the barley into cocks, and to pay the tenth cock in satisfaction of the tithes of the barley, and of the rakings *minus voluntariè* dispersed. And it was thereupon demurred;

Prescrip-
tion to pay
tithes
of the 1
ley in a
charge
the tithes

1598.

the rakings
involunta-
rily dis-
perfed,
good.

Modus to
pay tithes
wool at
Lammas-
day, good.

Custom to
render no
tithes for
young cat-
tle reared
for plough
or pail,
good.

Custom to
pay a
hearth-pen-
ny for all
combustible
wood, good.

demurred; because he did not aver, that those rakings were not *minus voluntariè* dispersed. For *Bacon*, who moved it, said, that in 31 *Eliz.* it was ruled in the common bench in one *Adams'* case, that a prescription to pay the tenth cock generally, in satisfaction of all rakings, was not good. For he might leave the greater part of the corn in rakings. But all the court held, that the prescription was good, and there needed not any averment; but that ought to come on the other part, if he would. Secondly, he sued for tithes of wool, and alleged a custom to pay it every year at *Lammas-day*; and that he set it out, &c. And it was thereupon moved, that it was not good; for this is not a *modus decimandi*; but for the time only, which is to be tried in the spiritual court. But the court held it to be good: for it is due *de jure*, when it is clipped; but by prescription it may be set out altogether at another day, and that is good. And if the spiritual court will not allow thereof, as it is here alleged that they will not, it is fit to prohibit them. Thirdly, he prescribed, that for young cattle reared for the pail to be milch-kine, or for the plough, no tithes have been accustomed to be paid: and it was thereupon demurred, and adjudged a good prescription; for they be for the publick weal. And the parson is to have benefit of them in another kind. And it was held, that for pastures of such cattle no tithes are due for the reason aforesaid. Fourthly, he prescribed, that for all wood combustible he used to pay a penny, called a *hearth-penny*, in satisfaction for all tithes thereof: and it was thereupon demurred. And it was adjudged to be a good prescription. For other kind of tithes he alleged also other such payments of the like sums, &c. *Et quod omnes, et singule persone, rectores de, &c.* have used to accept thereof, &c.; and the defendant traverseth; *quod omnes, et singule, &c.* had not accepted. And it was thereupon demurred; for he ought to have traversed the custom alleged, and not, *quod omnes, et singule, &c.* did not accept. For then, if any of them did not accept, he overthrows the prescription, which is not reasonable. And so was the opinion of the court. Wherefore it was adjudged, *quod prohibitis sit.*

H. 42 Eliz. A. D. 1599. B. R.

Austen v. Pigot. [Cro. Eliz. 736.]

PROHIBITION for suing for tithes, wherein it was suggested, that *P.* proprietor of the rectory of *B.* wherein those lands are, and all his predecessors have had twenty acres of pasture, and another close containing twenty acres of wood, in satisfaction of tithes. And his witnesses being examined, according to the statute of 2 *Ed.* 6. proved, that he had the twenty acres of pasture, but not of wood. And thereupon *Coke*, attorney general, prayed consultation: for the suggestion is not sufficient, that he had the close, &c. without shewing of what estate, or how. The suggestion also is not proved as it is alleged. But all the court held it to be well enough: for it is sufficient that he had it, and the other cannot shew how. And so doctor *Cotton's* case was ruled accordingly. The proof also in a prohibition need not to be so precise: but, if it appear that the court-christian ought not to hold plea thereof, it sufficeth. And therefore, if there be a prescription, that the parson holds an hundred acres of land in satisfaction of tithes, and the proofs be, that he holdeth sixty acres only in satisfaction of them, it is well enough. So here the substance is proved, that he held land in satisfaction, &c. wherefore it was agreed, that the plaintiff should declare, and, that the defendant should plead to issue.

Proof in case of a prohibition need not be precise.

Supra 199.

H. 42 Eliz. A. D. 1599. B. R.

Sibley v. Crawley. [Cro. Eliz. 736.]

PROHIBITION for tithes; the defendant shewed, that, before that time, the plaintiff had sued in chancery, to stay it by *English* bill, and afterwards brought a prohibition there, and a consultation was there granted; and, that this prohibition is for the same cause, viz. for matter of discharge: wherefore he prayed a consultation upon the statute of 50 *Ed.* 3. c. 4. which is, that consultation being once duly granted, there shall not be another prohibition. But the court held, that this consultation was not duly granted according to the intent of the statute; because the prohibition was not duly grantable there, and so out of the statute: for it was not duly granted upon an *English* bill. And by *Popham*,

Prohibition after consultation, if it were not granted upon examination of the matter.

1599.

and they ought to be appointed how they shall go by him, who had then the possession before the council, and that was intended to be the copyholder himself. But of lessees for years it is otherwise; for they shall be intended to be the possessions of the bishop himself, at the time of the council. Wherefore, *Sc. Gaudy* and *Clench* doubted thereof: Wherefore *adjournatur*, 8 Ed. 4. 13. Note, that *Psch. 44 Eliz.* this case was argued again; and then *Gaudy*, *Fenner*, and *Yelverton* resolved, that this prescription was good; for all copyholds are derived out of the manor: and it shall be intended, that this prescription had its commencement at such time, when all was in the lord's hand; and the one prescription is not contrariant to the other, although both were from time whereof, *Sc.* for the one shall give place to the other: and this objection may be, where a copyholder prescribes for common, or the like, which is usual. But *Popham* held his former opinion: yet, notwithstanding, it was adjudged for the plaintiff.

P. 43 Eliz. A. D. 1601. B. R.

Beal v. Web. [Cro. Eliz. 819.]

No consultation where a modus appears, though not precisely the same, yet was suggested. Vide *supra*, *Austen v. Pigot*, S. P.

PROHIBITION for tithes against the defendant, farmer of the rectory of *Frittender*, in the county of *Essex*, it was surmised, that, from time whereof, *Sc.* the plaintiff had used to pay 4s. *per annum*, in discharge of all tithes. And his proofs were, that he used to pay 4s. 6d. *per annum*. And upon this variance, a consultation was prayed. And because it appeared, that there were not any tithes due in kind to the parson, as he had sued; but it was a *modus decimandi*, although not in such manner as the plaintiff surmised, the court held, that the defendant should not have a consultation. For he had not any cause to sue for tithes of the land, and it was ruled accordingly. *Vide 2 Eliz. Dy. 171.*

T. 43 Eliz. A. D. 1601. C. B.

Blackwell's Case. [Cro. Eliz. 843.]

Tithes severed may be sued for in the court christian.

PROHIBITION. The case was, that a parishioner severed the tithes from the nine parts; but being in a close, the gate was locked so that the parson could not come at them, and he sued in the spiritual court: and there the question was, whether the gate were

were locked, or open. And thereupon a prohibition was brought, supposing this to have been a temporal matter ; for the tithes being severed are lay chattels. But the court said, that although the tithes be severed, yet by the statute they remain suable in the spiritual court. And then the other is but a consequent thereof, and therefore is there triable. And if they refuse to allow his proofs, as it was surmised, (but not within the prohibition), it was said, that he ought to appeal.

H. 44 Eliz. A. D. 1602. C. B.

Robinson, Vicar of the Church of Kimbolton, v. Bedel.

[Cro. Eliz. 873.]

TRESPASS, for taking certain loads of wood, set out for tithes: the defendant pleaded not guilty. The plaintiff shewed in evidence, that in the time of king *Ed. 3.* the rectory was appropriated, and the vicarage then endowed, and (*inter alia*) the tithes of wood were allotted to the vicar. The defendant shewed, that, for 160 years last past, there had not been any vicar presented there, until the plaintiff obtained a presentation from the queen by colour of lapse ; and so pretended, that in regard it had continued so long in this manner, it became reunited to the rectory. But the court informed the jury, that although a vicarage is always taken out of the parsonage, and for the necessity thereof may be reunited to supply the parsonage, yet, by continuance of time in not presenting a vicar, which is the default of the parson himself, it ought not to be adjudged to be a discontinuance of the vicarage. But somewhat ought to be shewn of the reuniting thereof. Wherefore, by the court's direction, the jury found for the plaintiff.

Vicarage not reunited to the rectory by non-presentation of a vicar in 160 years.

T. 44 Eliz. A. D. 1602. B. R.

Day v. Peckvill. [Moore 915.]

IN debt for tithes, *non debet* was pleaded, and it was found that *debet* 78 l., and as to the residue *non debet* ; and damages were assessed at 1 d. and 4 c. costs. The plaintiff released the damages and costs, and had judgement for the debt. Note, 1. The statute which gives treble damages does not allow the jury to give other damages. 2. No costs being given by the statute, the jury cannot assess costs. 3. Two farmers may join in an action upon the statute. 4. A farmer of tithes shall have an action by the equity of the

Cro. Ja. 70. S. C. affirmed in error.

1602. the statute, because he has the right to the tithes, though the statute does not give the action to the farmer. 5. An agreement with the one farmer shall bind his companion.

H. 45 Eliz. A. D. 1603. B. R.

Gibson v. Holcraft. [Yelv. 31.]

THE suggestion in a prohibition to stay a suit in the spiritual court for tithes was, that the abbot of *Vale Royal* in *Cheeshire* was seised of the parsonage of *W.* and of the grange of *Darnal*, whercof tithes were demanded by the present parson of *W.* and that the said abbot and his predecessors from time whereof, *&c.* were seised of the said parsonage of *W.* and of the said grange of *D.* in their demesne as, *&c.* in right of their abbey, and *ratione inde* shewed the unity of possession in discharge of the tithes upon the statute of 31 H. 8. To which the defendant pleaded, that the abbey was founded 5 E. 1. (which is within time of memory), and shewed and confessed the unity of the parsonage and grange after the time of the foundation. And upon the motion of *Coke*, the attorney general, (*per totam curiam*), the plea in bar is good; and it is not necessary to traverse the prescription, for the shewing of the foundation of the abbey to be after the time of memory is a sufficient confessing and avoiding. But, if the defendant against the suggestion of the perpetual unity would shew, that the demesnes before the statute, and in the time of the abbot, were in the hands of the farmers, *&c.* there, he ought to traverse the prescription; for although the possession was chargeable in other hands, yet as to the fee-simple which remained in the abbot, it is a discharge in right.

M. 2 Ja. A. D. 1604. B. R.

*Hall v. Fettyplace.** [Cro. Ja. 42.]

What custom for non-payment of tithes of later mowth is good.

PROHIBITION for tithes; whereas he was seised in fee of three acres of meadow *infra parochiam de Sunning*; and that within the said parish there is such a custom, that every one seised of any

* This case is differently reported by Moore, 758; for he says, that this prescription to make the first crop into small cocks in lieu of all the tithes of the first and second crop was not allowed: but, if he had prescribed to make it into great cocks, or to carry it to the parson's barn, that would have been a good prescription. But *Qu.* whether this statement be not correct, and whether any tithes be due of the after mowth. Vide *infra*. Cro. Eliz. 660.

meadow

meadow within the same parish have used time whereof, &c. to cut down the grafs upon such meadow growing at their proper costs, and the said grafs to ted and shake abroad, and the said grafs, so dispersed and cast abroad, to gather into weoks and windrows, and to put into small cocks; *et post primam circumlationem inde* the tenth cock *inde* to set forth for the parson, or his farmer, in satisfaction of all tithes, as well of the first mowth as of the latter mowth of that meadow for the same year, which the parson, &c. had used to accept, &c.; and allegeth *in factis*, that he did so in such a year; and that the defendant sued him for tithes of the latter mowth, &c. And hereupon the defendant demurred: and it was moved for the defendant, that this prescription was not good; because there is no more given to the parson than he ought to have; for, by giving unto him the tenth cock, it is that which the law appoints, and therefore cannot be a recompence for another thing; for the tenth of the hay of the first mowth cannot be satisfaction for the tenth of the after mowth. But because it was alleged, that he at his own costs had tedded and shaken it abroad, and gathered it into weoks and windrows, and made it into little cocks, and so was at a greater labour and charge than the law appoints, and the parson hath benefit by the said labour, it is a good cause of discharge; and a precedent was shewn, *Puscb. 37. Eliz. Rot. 284.* in this court, betwixt *Awbrey* and *Johnson*, parson of *Burghfield* in *comit. Berkshire*, where it was surmised, that every inhabitant there had used to cut down the grafs in the meadows at the first mowth, and at his costs to make it into hay, and to set forth the tenth cock of hay in satisfaction of the hay coming as well of the first mowth as of the latter. And it was adjudged to be a good bar for the tithes of the latter mowth: which was held to be all one with this case in question. And *Popham* said, he had known it to be resolved, that of right, without any special custom alleged, no tithes shall be paid for hay of the latter mowth; for the rule in our law is, that tithes shall be payed *ex annuatis renavantibus simul et semel*. Wherefore, without view of any precedents, or hearing argument therein, they agreed, that the prohibition should stand.

H. 2 Ja. A. D. 1605. B. R.

Cornwallis v. Spurling. [Cro. Ja. 57.]

Land of the
Templars
given to the
order of St.
John of Je-
rusalem by
17 E. 2. and
to the king,
by 32 H. 8.
is not tithe
free.
Moore 913.
S. C.
Vide Infra.

IN debt by the parson of *Grovel* upon the statute of 2 Ed. 6. for not setting out tithes, a special verdict was found, that the lands whereof the tithes are demanded were parcel of the possession of the Templars, who were dissolved in the time of Ed. 2. and those possessions by act of parliament 17 Ed. 2. were given and annexed to the priory of St. *John* of *Jerusalem*, with all privileges, &c. And it was found that the Templars had a special privilege time whereof, &c. to be discharged of tithes of those lands which *propriis manibus excolunt*: and it was found that, by special act of parliament anno 32 H. 8. the possessions of the priory of Saint *John* were given to the king by general words, of all lands, tenements, &c. in tam amplis modo et formâ, as the abbot had them; and from the king those lands came to the defendant: and whether he should hold them discharged from the payment of tithes as the abbot had them, was the question. And it was argued by *Tanfield* and others for the defendant, and by *Paget* and others for the plaintiff: and after argument all the court resolved, that he should not have the privilege to be discharged; for, by the common law, a lay person was not capable of such a privilege: and if such lands had come to the king by the relinquishment or dissolution of any monastery, the king should not have had the benefit of that privilege until the statute of 31 H. 8. And by that statute it is appointed, that all monasteries, abbeys, &c. which before had come, or afterwards should come to the king, by suppression, surrender, &c. the king should have in such manner and form, &c. and that he should have them discharged from the payment of tithes as the abbots, &c.; so as the makers of that law intended, that by the first clause, without the last, they should not hold them discharged, and therefore they added that clause. But this statute extends only to such possessions as came to the king by surrender, &c. and should be vested in him by force of the said act; and doth not extend to possessions which vested in him by another act of parliament, so not by the first; according to the rule which is taken in 2 Co. 46. in the archbishop of *Canterbury's* case. And these lands were here given to the king by a special act of parliament, 32 H. 8. which hath the same words in the first clause as the act of 31 H. 8. hath, but hath not the second; and therefore there is no cause of holding

Supra. 190.

holding them discharged from tithes. And so it was adjudged accordingly for the plaintiff. And in this same term a like judgement was between the same parties in a prohibition upon a demurrer.

1605.

P. 3 Ja. A. D. 1605. B. R.

Champernon v. Hill. [Cro. Ja. 68.]

IN debt upon the statute of 2 Ed. 6. for not setting forth tithes, the plaintiff shewed that two parts of the tithes of the place, &c. appertained to the rectory, and the third part to the vicarage; and that he had a lease for years of the rectory, and another lease of the vicarage; and for not setting forth the tithes he demanded according to the statute the treble value. The defendant pleaded *non debet*, and found against him: and it was now alleged in arrest of judgement, that inasmuch as the plaintiff's cause of action is grounded upon several leases, he ought to have brought several actions, his title being several: but the court held that the action was well brought, in regard he had both titles in him, and he is to have the entire tithes; and this action is brought upon the tort, because he did not set out the tithes; wherefore it was adjudged for the plaintiff.

One action may be brought upon the statute of 2 & 3 E. 6, upon several titles, if those titles be conjoined in the plaintiff. Yelv. 63. Moore 914. 1 Brownl. 86. Nov 3. S. C.

M. 3 Ja. A. D. 1605. B. R.

Hutton v. Barnes. [Yelv. 79.]

HUTTON being sued in the spiritual court at *Durham* for tithes, brought a prohibition there, and suggested that the prior of *Durham* was seized of the grange of *Sesgersomwick* in right of the church, viz. the priory; and prescribed in the prior and his predecessors to hold that grange without payment of any tithes; and shewed the dissolution of it, and how it came to H. 8. and the statute of 31 H. 8. to hold it as the house of religion held it before; and derived to himself a lease of 50 years from queen *Elizabeth*; and after his prescription in *non decimando*, shewed how the defendant sued him in the spiritual court for the tithes of forty fleeces of wool. To this the defendant pleaded, that he sued the plaintiff for the tithes of 400 fleeces of wool, and prayed a consultation; and for the variance between the libel and suggestion the justices of assize awarded a consultation, and adjudged double costs to the de-

A variance between the suggestion and the libel, where the plaintiff in prohibition prescribes in *non decimando*, is not material: *fecit*, where in *modo decimandi*.

1605. pendant. And *Leverton* assigned both these matters for error. And *per curiam*, they are error; for the variance is not material here, because the plaintiff prescribes *in non decimando*, and thereby ousts the spiritual court of all manner and power of jurisdiction for any tithes arising from this grange, because it is discharged *in se*; but, if the suggestion had been on a *modus decimandi*, then it would be otherwise; for there the suit for tithes belongs originally to the spiritual court, and therefore there the suggestion ought to agree with the libel; for if the parson libels for tithe of hay, and the other will suggest a custom for tithe of corn, that is not to the purpose; for it is not for the same thing. The same law where they vary in the quantities of the thing demanded, because the suggestion is founded upon the libel, and the plaintiff is to stay the proceedings there but for one cause certain. But in the case *supra*, the suggestion discharges the spiritual court from all manner of power for any tithes at all; and therefore the variance is not material. 2. The judgement for double costs was error on the express letter of the statute of 2 & 3 E. 6. which gives double costs only for want of proof of the suggestion, and for no other cause. *Quid nota.*

The defendant in prohibition entitled to double costs only for want of proof of the suggestion.

P. 4 Ja. A. D. 1606. B. R.

Grene v. Aussen. [Yelv. 86.]

The rector *primi facie* entitled to all the tithes of the parish, nor can the court presume any thing in favour of the vicar without endowment or prescription.

AUSTEN, vicar of *Aveley* in *Essex*, libelled in the spiritual court for the tithes of herbage and agistment of cattle on the grounds there after harvest. This was against *Grene*, who brought a prohibition, and laid a custom within the parish, *quod quaelibet persona habens et possidens aliquod pratum sive fundum in aliquo uno anno infra parochiam prædictam unde senum eodem anno nactum fuit sive proventus a tempore cujus, &c. usa fuit et consuevit aptis temporibus anni illius gramen super hujusmodi pratis sive fundis crescens ad expensas suas proprias metere et defalcare, et gramen sic messum postea ad similia custagia, &c. in cumulos, vocat' cocks, congerere, et quemlibet decimum cumulum sic inde congeß' a cæteris novem cumulis, &c. ad usum rectoris ecclesiæ parochial' prædictæ sive ejus firmarii, &c. dividere et exponere, in plenam et integram contentionem, solutionem, satisfactionem, et exonerationem, ac nomine et loco omnium et singular' decimarum quarumcunque de in vel super aliquibus hujusmodi pratis sive fundis unde senum in hujusmodi anno nactum fuit, eodem anno surgent, renovant, &c. quem quidem decimum cumulum, &c. in forma, &c. congeß'*

28th, &c. *omnes et singuli rectores, &c. in plenam et integram contentationem, &c. ac nomine et loco, &c. acceperunt, &c.* and alleged in *factis* a performance of the custom the same year the vicar libelled. And thereupon the defendant, being vicar, demurred; and it was adjudged for the plaintiff. And two points were resolved.

1. That payment of the tithes to the parson is a sufficient discharge against the vicar, because all tithes of common right belong to the parson, and the vicarage is derived out of the parsonage; so that no tithes *de jure* belong to the vicar, but only on an endowment or prescription, which ought to be shewn *ex parte* of the vicar, and the court cannot intend it, for the vicarage is a diminution or impairing of the parsonage, of which the court will not take notice, unless the parties shew it.
2. That the custom *supra* is good; for in regard the owner of the ground pays tithe of hay, he is thereby discharged of common right from tithe of agistment of the same land in the same year, because one land shall answer but one tithe for one year, and the agistment is but the profit by the mouths of the beasts of the same land of which before the parson had tithe of hay. And *Tanfield* justice said, it was adjudged in one *Edolphe's* case *de com. Oxon*, that once paying tithe of rye or wheat by the sheaf, cannot afterwards pay tithe of halm of the same land; for the halm is but part of the stalk on which the tithe sheaf grew; according to *F. N. B. 53 b. Yelverton pro querente*.

Land which has paid tithe hay, not chargeable with an agistment tithe the same year.

M. 4 Ja. A. D. 1606. B. R.

Lady Waterhouse v. Baude. [Cro. Ja. 133.]

ACTION upon the case; the plaintiff declares, whereas by the statute 45 *Ed. 3. cap. 3.* tithes ought not to be paid for gross trees; and by the statute 32 *H. 8. cap. 7.* none ought to be sued for tithes of gross trees; that she had cut down such timber trees being above the growth of 20 years, and that the defendant as parson sued her for tithes of them against the said statute. Upon this declaration, it was demurred; for it was moved, when a statute prohibits suing, and gives no special penalty; there action upon the case lies not for doing a thing against the prohibition of the statute; as, where a man distrains *extra feudum*, or in the highway, &c. And all the court held, that the action lies not; for no one shall be punished for suing in the spiritual court for any matter which is properly demandable there, although peradventure

An action on the case does not lie for being sued for tithes of *silva cadua*.

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Where a thing is forbidden by a statute, and no penalty specified, the action must be *tam pro rege quam, &c.*

he hath not any cause of action; but, if he sues in the spiritual court for matter which it appears by his libel is not suable there, and of which the said court hath not any jurisdiction, but the common law hath jurisdiction, there, action upon the case lieth; for it is a suit for vexation, and seeks to take away the jurisdiction of the courts of the common law: but, if the suit be there for a thing demandable and recoverable there, by any thing which appears by the libel; and by the defendant's plea, or by any collateral matter he is barrable there; no action upon the case lieth: and here although the statute be, that none shall be compellable to pay tithes of gross trees, yet it is lawful for the parson to draw it in question in the spiritual court, whether they were gross trees or not. And they held, that where a statute prohibits a thing, and adds no penalty; true it is, that an action lies for doing against the prohibition of that statute; but that ought to be an action brought *tam pro rege quam pro seipso*; because in such case the king is to have a fine: and for that this action is brought only by the party, and not *tam pro rege quam pro seipso*, therefore they all held, although otherwise an action might lie, yet for this cause it was not well brought: wherefore it was adjudged for the defendant.

M. 5 Ja. A. D. 1607. B. R.

Anonymous. [Cro. Ja. 199.]

Birch tithable though above 20 years growth.

PROHIBITION; it was held *per curiam*, that tithes of birch shall be paid, although it be of 20 years growth, and more; so of holly, alders, and maple; and (the principal question being concerning birch) a consultation after some advisement was awarded; and *Coke* cited one *Leonard's* case, 34 *Eliz.* to be so adjudged.

T. 6 Ja. A. D. 1608. B. R.

Edmonds v. Booth. [Yelv. 131.]

A freehold lease of tithes cannot commence in future.

BOOOTH, parson of *B.* in *Suffolk*, leased all his tithes of 200 acres of land, whereof *Rabbit* was then seised, to him and his wife, and the heirs of *Rabbit*, to the said *Rabbit* by indenture, *Habund'* from *Mich'* next to him and his heirs during the life of *Booth*. *Rabbit* died, and *E.* his wife had these 200 acres for her jointure; she married *Fowler*, who demised the 200 acres to

Edmonds

Edmonds the plaintiff, and the heir of *Rabbit* granted also to the plaintiff the tithes of these acres at will, and being sued by *Booth* for tithes in the spiritual court against his own lease, he brought a prohibition on the matter aforesaid; and upon demurrer it was adjudged for the defendant, and that he should have a consultation. Wherein the point was, whether the lease was void, because it was to commence at a day to come, and was for life. And *Fleming* chief justice, *Fenner* and *Williams* conceived that it was void; for although tithes are spiritual, and are not extinct in the land; yet in the conveyance of them they ought to follow the nature of the land, rent, or other hereditaments, which being *in esse*, as 8 H. 7. 3. is, cannot be granted to commence at a day to come, if an estate for life be limited; and as 21 H. 6. 46. tithes are always *in esse*. But by *Yelverton* and *Croke* contrary; for here the lease is made but of those tithes, which should be due for the land of which *Rabbit* was then owner, so that it does not enure by way of interest, but by way of discharge and retainer, for *Rabbit* cannot have tithes of his own land, and then a discharge may well commence at a day to come, as to be discharged from suit to a mill, or such like. But by the chief justice and *Williams*, as the lease is pleaded, it cannot be taken to enure by way of discharge; for the plaintiff pleads, *by force whereof Rabbit was seised of the tithes to him and his heirs for the life of Booth*; so that the plaintiff having pleaded it by way of interest, they as judges cannot intend or construe it otherwise. And, by *Fleming* chief justice, this lease cannot enure by way of discharge, for there are no such words in the lease; which proves it was not intended by the parties to operate but by way of interest, and that was more beneficial for the lessee; for if it should enure by way of discharge only, it is such a privilege annexed to the land, as cannot be granted over; but, if by way of interest, it may well be granted over. And so much appears also in this case; for the wife of *Rabbit* is owner of the land, but the son takes upon him to be owner of the tithes, which cannot be, if the first lease had enured by way of discharge. And *Yelverton* inclined much thereto, that the pleading of the lease, and the seisin by force of the lease, was not good. *Quod nota.*

M. 8 Ja. A. D. 1610. B. R.

Roberts's Case. [12 Co. 65.]

A suggestion that the plaintiff in prohibition had but one witness to prove a deed in the spiritual court is not a sufficient ground for a prohibition, unless such witness were offered and refused.
Cro. Ja. 269. S. C.

IN this term, in the case of one *Roberts*, a prohibition had been granted in a case of subtraction of tithes, upon surmise that the plaintiff, who was the defendant in the spiritual court, had but one witness in that court to prove his demise; to which that court said, that *singularis testis* is not allowable: and upon consideration and sight of a prohibition granted upon the same cause in Hil. 3 El. in *Banco Regis*, it was resolved by *Coke* chief justice *Et istam curiam in Communi Banco*, that a consultation should be granted, and this for divers causes.

1. It appears by the Register, fol. 5. that it is put for a rule, *quod non est consonum rationi, quod cognitio accessorii in curia Christianitatis impediatur, ubi cognitio causæ principalis ad forum ecclesiasticum noscitur pertinere*: and with this agrees 1 R. 3. 4.

2. If such a surmise were allowed, then in every case for mere delay it might be made; for he who was plaintiff in the spiritual court cannot deny, that where it is surmised that he hath one witness, that he hath two or more, for then he affirms matter against himself: and when the spiritual court hath jurisdiction of the principal cause, they determine the accessory. But it was objected, that if *A.* claiming a lease by *B.* of a rectory, libels for subtraction of tithes, and the defendant pleads a former lease made by *B.* and *C.* and the defendant hath but one witness in the case to prove the former lease, if no prohibition shall be granted, the defendant shall be charged: and if *C.* sue him upon the statute of 2 Ed. 6. at the common law, the testimony of that one only will there be sufficient, and so he shall be twice charged: to which it was answered, that first the fault was the defendant's, that he would not set forth his tithes, and then he shall be charged whosoever takes them: but in such a case, those of the ecclesiastical court will upon one good witness, and any concurrent vehement presumption, as possession, or the like, allow of such a proof: and the testimony of one witness in our law is no conclusive evidence, but ought to be left to the conscience of the jury, and so the validity or invalidity of proof of matters of *fact* shall be left to them; but if a question of the common law arise from the party upon the construction of a statute, or the like, and those of the ecclesiastical court

court will take upon them to judge of it against the rule of law, there, upon special surmise of it, and upon the shewing of the answer or other pleadings of the parties, by which it appears to the court, that such surmise is on a good ground, a prohibition lies; for matter in law, arising upon estates or interests (given) by the common law and construction of statutes, ought to be determined according to the rules of common law; *et non debet trahi ad aliud examen.*

And Coke chief justice cited a notable judgment, *Pasch. 35 El. in Bank le Ray*—Fuller brought a prohibition against Clemens and Wiskard; and Fuller counted that he himself was owner of the rectory of Longham in the county of Norfolk, and libelled against Clemens one of the defendants, before the official of the bishop of Norwich, for subtraction of tithes, *scil.* of wheat, &c. pendent which suit, the said Wiskard, intervening *pro interesse suo*, made these allegations against the said Fuller.

1. That the said rectory was impropriate to the monastery of Wendling, and by the dissolution of the said monastery, came to the hands of H. 8. and conveyed it by mesne descent to queen Elizabeth, who by her letters patent of concealment granted it to Min and Hall, who enfeoffed Bozome, who let it to Wiskard for four years, and proved his allegations by witnesses, upon which in fine, sentence was given against Fuller, and 8 l. 10 s. given to Clemens for costs, and 13 l. 6 s. to Wiskard; and after Fuller appealed to the court of the arches, and there Fuller claimed the said rectory by reason that Hall was seised of it, and by his deed gave and granted the said rectory, and all lands and tithes to it appertaining, to sir Edward Clere, before the feoffment supposed to be made to Bozome; and that sir Edward Clere by his deed enfeoffed Fuller; and although that he offered to prove the delivery of the deed of the said feoffment made to sir Edward Clere by one sole witness, the ecclesiastical court would not allow it without producing another witness: and Fuller further said, that although he had further alleged there, that these were matters determinable at the common law, notwithstanding they gave sentence: the defendants to have a consultation pleaded, that Fuller in the said court of the arches proved the delivery of the deed aforesaid, by sir Edward Clere and Mouse, but could not prove livery and seisin according to the deed; and for this cause sentence was given, without (for) that the judges of the arches would not admit the said proof, unless he

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proved the deed by other witnesses; upon which *Fuller* demurred in law; and it was objected by the counsel for *Fuller*,

1. That *Wiskard*, who is a mere stranger to the suit, and who comes in *pro interesse suo* in the said rectory, pleads matter merely determinable at the common law, *scil.* letters patent, feoffment, and lease for years; and on the other part *Fuller* claims an estate in the said rectory, by conveyance at the common law. And now the question in the ecclesiastical court being only who hath the best estate in the said rectory by the common law, this ought to be tried by the common law, and not in the ecclesiastical court; for this is the birth-right of the subject to have his inheritance and freehold tried and determined by common law; for the civil law differs much in deciding of inheritances.

2. It was objected, that all matters in law ought to be determined by the judges of the law; and in this case, matters of law arising, *scil.* if a man hath a rectory impropriate, which consists in glebe and tithes, and by his deed gives and grants the said rectory, and all lands and tithes any way belonging or appertaining to it, to another and his heirs; and no livery is made in this case, if the tithes shall pass, or no, for that tithes may pass without any livery: this question is not fit to be determined by the ecclesiastical judges, but by the judges of the common law, *quod quisque novit, in hoc se exercent.*

3. It was objected, that *Wiskard* was a mere stranger to the suit, and all his allegation is temporal, and for that it is a stronger case to maintain a prohibition, so far as betwixt him and *Fuller* nothing is in question, but to whom the inheritance of the rectory belongs; but *Clemens*, who is sued for subtraction of tithes, hath greater colour in his defence, being lawfully sued in the ecclesiastical court, than *Wiskard*, who is no party to the suit for any ecclesiastical cause, but all his allegation, as hath been said, is temporal.

4. It was objected, that *Fuller* had but one witness to prove the delivery of the deed; and in the ecclesiastical law, *unus testis est nullus testis*; for all which causes it was prayed that the prohibition may stand, and that no consultation may be granted.

To which it was answered and resolved by sir *Christopher Wray*, chief justice, and *per totam curiam.*

1. That to the first objection, for that the original belongs to the ecclesiastical court, the determination of all that which depends

pend upon it belongs to the judges of the same court, although that the matter be triable by the common law; but where the original matter belongs to the common law, and is there commenced, and issue be taken upon matter triable by the ecclesiastical law, there the judges of our law shall write to the judges of the ecclesiastical court to try it, and to certify: and the reason of this diversity is, that our judges have authority to write and command them by the king's writ to certify to them; but they cannot write to the judges of our law to try any thing, and to certify them, for they have no such authority to command by writ, but they are to obey the writs of the king: as in any action ancestrel, if bastardy be pleaded in the demandant, and upon this issue be joined, this shall be tried by the bishop, and his certificate shall bind: so in a *quare impedit*, if issue be taken, whether a clerk, which was presented, was able, or not able, this shall be tried by examination of the clerk, and certified by the bishop: but, although that such issues are in their nature triable by the ecclesiastical law, yet, if the case was such, that the ecclesiastical court could not try it, then (to the end that justice should not be wanting) such ecclesiastical matter should be tried by the common law, as 4 *Ed.* 3. 26. if the presentee be dead, if he was able, or not able, shall be tried *per pais*; for the bishop cannot try it: but against this was objected the statute *de articulis cleri*, c. 13. by which it is provided, *quod de idoneitate persone presentate ad beneficium ecclesiasticum pertineat examinatio ad iudicem ecclesiasticum*; upon which it was concluded that the trial *de idoneitate persone* in all cases belongs to court-christian. To which it was answered and resolved, that true it is, that the trial of ability belongs to them; but the statute explains in what manner it shall be made, for the statute saith, *pertinet examinatio ad iudicem ecclesiasticum*, so that this trial ought to be by examination of the party, and this cannot be when the presentee is dead: and although he be not party to the writ, yet he may be examined; and with this agrees 39 *Ed.* 3. 2. The Earl of *Arundel's* case, and 4 *Ed.* 3. 25. 16 *El.* *Dyer* 327. So, if bastardy be alleged in one who is not party to the writ, there, for this, that the certificate binds for ever, it should be against law and reason, that he should not be party to the certificate; for this cause in such case it shall be tried *per pais*; and if any difficulty ariseth upon it, the judges of our law use to consult with the judges ecclesiastical; and with this accords 4 *Ed.* 3. 37. The same law of profession, 42 *Ed.* 3. 8. So, if bastardy be alleged in one who is dead. *Vide*

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17 Ed. 3. 5. where bastardy is alleged in the tenant, and one who is a stranger to the writ, who are sisters. *Vide* 32 Ed. 3. Trial 59. where the tenant alleged bastardy in himself, and the demandant averred him *mulier*. *Vide* 29 Aff. pl. 14. 6 El. Dyer 226, 228. If the issue be *quod vacavit per resignationem*, part of which is temporal, and part spiritual, this shall be tried *per pais*. *Vide* 9 H. 7. Profession and the time of it, &c. But admission and institution, although that it be alleged in a stranger to the writ, yet this shall be tried by the ordinary; as it appears 7 Ed. 6. 78. 6. in Dyer; for admission, institution, resignation, *et similia*, are judicial acts, and remain in their courts and register, upon which they ground their certificate; otherwise it is of bastardy, idoneity, &c. By which it appears; that in divers cases the judges of the common law write to the ecclesiastical judges, commanding them to certify some thing put in issue; and the judges of our law prohibit the ecclesiastical judges to hold plea of some things which are determinable at common law; but the ecclesiastical court hath not power to write to our judges, or to command them, or to prohibit them when they hold plea of things determinable by the ecclesiastical judges; but this is erroneous, and shall be reversed by error. And on the other side, if in the ecclesiastical court the suit is for a legacy, and the defendant plead a release, if in the admitting or rejecting of proofs concerning this release, which is matter determinable at common law, they do wrong to the plaintiff or defendant, they have no remedy but by way of appeal.

2. To the second it was answered and resolved, that if upon consultation with men learned in the law, they give sentence according to law, this is well done; and no prohibition ought to be granted; but if they take upon them to draw the interest of any man *ad aliud examen*; and to judge against the rule of law, concerning the inheritance or interest of any, there prohibition lies: and in the case at the bar, they well resolved the law, for by the said livery of the charter the tithes do not pass as gross, for this, that the intention of the parties was to pass the entire rectory by scoffment, and not to pass the tithes by the same, and so to dismember the rectory by fractions, and that by construction of law, against the intention of the parties.

3. As to the third, it was answered and resolved, that by the ecclesiastical law, a stranger may come in *pro interesse suo*; and when they have jurisdiction of the original cause of the suit, we
ought

ought not to draw in question their order and proceeding; but if they proceed *inverso ordine*, or not observing form, this ought to be redressed by appeal: and although that the matter depending upon the original cause be determinable by the common law, yet it shall be determined, as it hath been said, in the ecclesiastical court.

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4. As to the fourth objection, it was answered and resolved, that such a surmise, that he hath but one witness, is not sufficient to have a prohibition, for this, that the ecclesiastical court hath jurisdiction of the principal, and if such a surmise shall be sufficient, all suits in the ecclesiastical court shall be either delayed, or quite taken away, for such a surmise may be made in every case; and the plaintiff in the ecclesiastical court cannot have any good answer to it to have a consultation. Which agrees with the resolution in the principal case, &c.

M. 8 Ja. A. D. 1610. B. R.

Hunston v. Cocket. [Cro. Ja. 252.]

DEBT upon the statute of 2 *Ed.* 6. for not setting out tithes: the jury find a special verdict, that a prior was seised of the advowson of this parsonage, &c. 24 *H.* 8. the church being then void, the bishop gave him licence to hold it in proper uses; and that there was not any endowment of the vicarage: and they find the statute of 4 *H.* 4. of appropriations, and the statute of 27 *H.* 8. which gives priories and religious houses to the king; and that the king presented the plaintiff by lapse, who was admitted, instituted, and inducted; and that the defendant did not set out his tithes, &c. The points intended were, whether the appropriation was good, there being no endowment of the vicarage; and whether this statute, being in the affirmative, (that vicarages shall be endowed), makes all appropriations void, unless there be a vicarage endowed; and whether an appropriation by the bishop's licence without the king's licence be good. But *Williams* said, it hath been resolved; that whether appropriations be good or not, cannot now be called in question; for they shall be intended to be good, and to have all requisite circumstances; and the statute gives them to the king, and doth not except any man's right, unless theirs only who had right at that time, which no parson now hath. But this case was without argument adjudged for the defendant; for the plaintiff

Appropriation good though the vicarage not endowed.

Presentment by the king for lapse

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when he is
patron is
void.

(e) 6 Co.
30.

plaintiff claims *per præsentationem regis ratione lapsus*: whereas it appears, if the king had any title to present, it was *jure coram*, and so the presentment merely void; and it is an admission, institution, and induction, without any presentment; which is merely void, as it was adjudged between *Green and Baker*, *quod vid.* (e) Wherefore for this cause, it appearing that the plaintiff had not any title, it was adjudged for the defendant.

M. 10 Ja. A.D. 1613.

Priddle v. Napier. [11 Co. 8. b.]

8 Brownl.
15.
2 Ro. Abr.
320 pl. 4.
S. C.

IN an attachment upon a prohibition in the common pleas by *John Priddle qui tam*, &c. against *Thomas Napier* gentleman, proprietor of the rectory of *Tintenbul* in the county of *Somerſet*, the plaintiff declares, that whereas one *Robert Shirburne alias Whillocke*, late prior of the priory of *St. Peter and Paul the Apostles*, of *Mowntacute*, in the county of *Somerſet*, *ordinis Cluniacenſis*, was ſeiſed of twenty-two acres of land, called *Perins-Hill alias Guilberts-Hill*, in *Tintenbul*, in the ſaid county, and of the rectory of *Tintenbul*, *eidem prioratui pertin' et ſpectan'*, *ac parcel' eiſdem priorat' exiſtes'* in his demefne as of fee in the right of the priory, and that the ſaid prior and all his predeceſſors, priors of the ſaid priory, before the diſſolution of the ſaid priory, and at the time of the ſaid diſſolution of the ſaid priory, were rectors of *Tintenbul* aforeſaid, and had and held the rectory aforeſaid, *ſimul et ſemel* with the ſaid twenty-two acres of land, *in manibus ſuis propriis in jure prioratûs ſui prædicti, ratione cujus idem nuper prior et omnes prædicti alii priores ejusdem nuper prioratûs per totum tempus prædictum ante prædictum tempus diſſolutionis prioratûs illius, uſque ad tempus diſſolutionis, &c. habuerunt et tenuerunt, ac idem nuper prior tempore diſſolutionis, &c. habuit et tenuit prædictas viginti et duas acras terræ exonerat', acquietat', et immunes de omnibus et omnim' decimis, &c.* and that 20 *Martii an 30.* the ſaid prior and convent by their deed enrolled in chancery, gave, granted, and ſurrendered the ſaid priory, the ſaid rectory, land, and all the poſſeſſions thereof, to king *H. 8.* his heirs and ſucceſſors; and that by force thereof, and of the ſtatute of 31 *H. 8.* of diſſolutions, king *H. 8.* was ſeiſed of the ſaid rectory, and of the ſaid land in his demefne as of fee, as in the right of his crown; and ſhewed the clause of the ſtatute of 31 *H. 8.* of diſcharge of payment of tithes; by force whereof, king *H. 8.* was ſeiſed of the ſaid

said 22 acres of land, &c. discharged of payment of tithes, and conveyed the inheritance of the said 22 acres to sir *Thomas Freke* and others; who anno 38 *Eliz.* demised the same to the said *John Priddle* for 99 years, if three of his sons or any of them should so long live; and averred their lives, and that the defendant *propriarius rectoriæ prædictæ*, &c. before the bishop of *Bath and Wells* sued the plaintiff for tithes of corn growing in the 22 acres of land, &c. *Et præd' Thomas Napier pro consultatione habendâ*, alleged a grant by letters patents of queen *Elizabeth*, anno regni sui *secundo*, of the said rectory to *Rive* and *Evelyn*, and to their heirs; and by mean conveyance, conveyed the said rectory to the said *Thomas Napier* in fee, and that he libelled for the said tithes, as he lawfully might; *absque hoc quod prædictus prior et omnes prædecessores sui priores præd' nuper prioratûs a tempore cujus contr' memoria hominum non extitit ante tempus dissolutionis*, &c. *nec-non usque ad tempus dissolutionis*, &c. *habuerunt & tenuerunt prædicti viginti & duas acras terræ exonerat', acquietat' & immunes de omnibus & omnimodis decimis quibuscunque super prædicti viginti & duas acras terræ quovismodo provenient', &c. prout*, &c. *& hoc*, &c. unde petit *judicium*, & breve *dicti domini regis de consultatione sibi in hac parte concedi*, &c. Upon which issue was joined, and the jury before the justices of *nisi prius* gave a special verdict, that the prior and his predecessors, *a tempore cujus*, &c. until the time of the dissolution, were seised of the said 22 acres of land in their demesne as of fee as in the right of the said priory; and that one *Thomas*, late prior of the said priory, was seised of the advowson of the said church of *Tintenhul* in fee in the right of his priory: and he being so seised *H. 8.* the 8th day of *May*, in the 20th year of his reign, by his letters patent (the exemplification of the enrolment of which under the great seal they set forth), *De gratiâ suâ speciali ac certâ scientiâ et mero motu suis licentiam dedit præfat' Tho' tunc priori nuper prioratûs, et ejusd' loci conventui et successoribus suis, quod ipsi et successores sui dictam ecclesiam parochialem de Tinten' præd', impropriare, consolidare, incorporare, annexare, et unire, et eam sic appropriat', consolidat', incorporat', et unitam, in proprios suos usus tenere possint*; with proviso to endow a vicarage, and that a competent annual sum should be distributed to the poor, with the usual *non obstante*; and that *John* bishop of *Bath and Wells*, ordinary of the said place, 4th *Sept.* 1529, by indenture tripartite, *viz.* one part sealed with the seal of the said bishop, the other part sealed with the seal of the prior and convent of *Bath*, (which confirmed the said indenture), and the

third part sealed with the seal of the dean and chapter of *Wells*; (which also confirmed the said indenture), *Ecclesiam parochialem de Tintonbul diœsæ nostræ diœcesis et sui patronatûs (ut asserunt) diœsis priori et conventui et successoribus suis et domui sive prioratui suo prædicti cum consensu pariter et assensu metuendissimi in Christo principis et domini Henrici octavi Dei gratia, &c. autoritate nostra ordinaria anneclimus, appropriamus et unimus per præsentés, ita quod cedente vel decedente rectore ejusdem ecclesiæ parochialis qui nunc est, seu aliter ipsa ecclesia quovismodo vacari contigerit, liceat ipsis priori conventui suisque successoribus per se vel per alium seu alios ipsorum nomine possessionem dictæ ecclesiæ parochialis autoritate propriâ intrare, &c. et in proprios usus convertere et in perpetuum retinere*: with endowment of a vicarage, and provision for an annual sum to the poor: and afterwards the then parson of the said rectory died; after whose death the said *Thomas*, prior of the said priory, into the said rectory entered, and was as well of the said rectory, as of the said 22 acres of land, seised in his demesne as of fee in right of the said priory: and afterwards the said prior *Thomas* died, and prior *Robert* succeeded him: and that the said prior *Thomas*, and prior *Robert*, ever after the said appropriation, held the said rectory with the said 22 acres of land in their own hands, *simul et semel*, in the right of the priory, and found the surrender of the said priory; and that the said king *H. 8. 24 die Julii anno 36 H. 8.* by indenture under the seal of the court of augmentation demised the said rectory to *William Petre* doctor of law for 21 years, who assigned it over to *Edward Napier*, and that no tithes were paid until the second year of queen *Mary*, and then the said *Edward Napier* had a sentence in the court of audience against one *Thomas Guil*, then farmer of the said 22 acres; and that after the said sentence until the 8th year of queen *Elizabeth*, tithes were paid of the said 22 acres, and conveyed the said rectory from king *H. 8.* by mesne descents to queen *Elizabeth*, and by the said letters patent and divers mesne conveyances to *Napier*: *et utrum super tota materia, &c. prædictus Robertus nuper prior et omnes prædecessores sui priores ejusdem a tempore cujus contrarius, &c. ante tempus dissolutionis, &c. necnon usque ad tempus dissolutionis, &c. habuerunt et tenuerunt prædicti 22 acras terræ exoneratæ, acquietatæ, et immunes de omnibus et omnimodis decimis quibuscunque, &c. Juratores penitus ignorant, et petunt advisamentum curiæ in præmissis, et si, &c.* And this case was oftentimes argued at the bar by the serjeants,

serjeants, and now this term it was argued at the bench. And in this case these points were resolved :

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1. That the information upon which the prohibition was granted, was sufficient in matter: for although every parish church is supposed to be presentative, and the incumbent ought to come in by admission, institution, and induction; yet the plaintiff in this case may prescribe, that the prior and his predecessors *a tempore cujus, &c.* have been rectors of the said church; for that amounts that it was improperiate, &c. and the beginning of a thing done before time of memory, cannot be known, *viz.* whether it came by union or impropriation. And therewith agrees 21 E. 4. 65. a. where, in trespass for certain cart-loads of oats taken at *Bodmin* against the prior of *Bodmin*, the defendant said, that the corn was growing in a certain place in *B.* in the parish of *B.* of which parish he is *persona impersonata, i. e.* incumbent; and he was driven to shew how he came to the same parsonage; wherefore he alleged title by prescription, and how the corn was severed from the nine parts, and that he took it, and that was allowed for a good title to the rectory. Wherefore, as to this point, the information was resolved to be good; but the addition of the impropriation, &c. had made it without question. It was also holden, that the conclusion of the prescription of the unity, *viz. ratione cujus*, the prior held the said land discharged of tithes, was not formal; for in truth, by the unity (as it shall appear after) the land was not discharged of tithes, but of payment of tithes; and so are the words of the statute of 31 H. 8. (as also shall be after shewed). But yet it seems, that so far as much as the prescription itself is well alleged in substance, so as the foundation of the prohibition is good, that the misprision of the conclusion and consequence thereupon, shall not be a cause to grant a consultation.

2. That the defendant's plea *pro consultatione habenda* (for he is in a manner an actor) was insufficient, because he has traversed a thing not traversable; for the prescription of the unity ought to have been traversed, and not the conclusion, *viz. ratione cujus*; and that for divers reasons; one as in logick, the conclusion of a syllogism cannot be denied, but the *major* or *minor* proposition; so it holds in law, which is the perfection of reason: and therefore in a *præcipe*, if one pleads, that the manor of *Dzle* is ancient demesne, and the land in demand parcel of the manor, and so ancient demesne; the demandant cannot say, that the land in demand is not ancient demesne, for that is the conclusion upon the two pre-

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cedent propositions ; the 1. That the manor is ancient demesne ; the 2. That the land in demand is parcel of the manor ; for *sequitur conclusio super præmissis*, and therefore it cannot be denied ; and therewith agree 41 E. 3. 22. a. 48 E. 3. 11. a. b. and many other books : so in the case at bar, the *major*, where there is a perpetual unity of a rectory and land therein until the dissolution, &c. there, the land is discharged tithes ; but here has been a perpetual unity of the rectory of T. and the twenty-two acres, *ergo*, the 22 acres are discharged of tithes, this conclusion cannot be denied. 2. It is not only a conclusion, but a conclusion of law, and matter in law shall not be put in issue to be tried by the country ; for the rule is, *quod quisque norit, in hoc se exerceat*, and therefore, *sicut ad questionem facti non respondent iudices, ita ad questionem juris non respondent juratores* : and if the jury take upon them to know the law, and find the special matter, and mistake the law, the judges of the law shall give judgement on the special matter according to law, without having regard to the conclusion of the jury, who ought not to take upon them the judgement of the law ; and therewith agree Pl. Com. Amy Townsend's case, f. 112. b. 114. b. vide 5 H. 7. Carew's case, 12, 13, 14, 15. 9 H. 6. 38. a. 13 H. 7. 22. &c. and the lord Berkley's case, Pl. Com. 230. b. One pleaded a gift to king H. 7. and to the heirs males of his body, *virtute cujus* he was seised in fee ; the other confessed the gift, *virtute cujus* he was seised in tail, and no traverse to the *virtute cujus*, for the conclusion is the conclusion of the law. 3. The issue is not well joined, 1. because the matter of the discharge is by reason of the unity, which is by force of the statute of 31 H. 8. and not by the common law, and the issue is joined upon a discharge by the common law, *viz.* prescription in the prior and his predecessors to hold the said 22 acres of land discharged of tithes, which is a discharge by the common law. 2. Every issue ought to consist of an affirmative and a negative, and here is not any affirmative, for that which comes after the *ratione cujus* is not affirmative, or positive alleged, but as a consequence upon the precedent matter, vide 8 H. 6. 6. a. 36 H. 6. 15. a. b. 9 E. 4. 36. 6 H. 7. 5. b. and therewith agrees the resolution of the judges in the bishop of Canterbury's case, in the second part of my Reports, fol. 48. so that here is not any issue joined of any matter alleged in fact in the information.

4. Upon the verdict divers points were moved at the bar, 1. If the said impropriation (as it was found) was good or not. 2. If it was good by the common law, if the statute of 35 Eliz. *reginae*,

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cap. 3. has supplied the imperfection of it or not. 3. When the jury find matter sufficient to bar the parson of the tithes, which was not parcel of their charge, nor within the issue, if without regard to that matter a consultation shall be granted. 4. If by the said impropriation and unity, so short a time before the dissolution, which could not be above nine or ten years, it should be such a discharge of tithes as is intended within the statute of 31 *H.* 8.

As to the first it was objected, that the said impropriation was void for two reasons: 1. because the king has made a licence of impropriation of the church of *T. per verba de presenti tempore*, where it appears, that at the time of the licence made there was an incumbent then of the same church; so that no appropriation could be made *in presenti*, but *in futuro*, by special words, to take effect after the death of the present incumbent; for as no appropriation can be made of a church which is full of an incumbent, but in a special manner to take effect after the death of the incumbent, so the king's licence (without which the appropriation cannot be made) ought to be special also, otherwise the king is deceived in his grant, and by consequence the appropriation is void; and that no appropriation can be made without the king's licence, *vide* *fir Will. Ethingham's case*, in 17 *E.* 3. 39. *a.* and *Plow. Com.* in *Grendon's case*, *f.* 495. *b.* And that in such case the appropriation ought to be made in such special manner appears in *Grendon's case*, and in 8 *Eliz. Dyer* 244. *pl.* 60. The 2d reason was, that the appropriation in the case at bar was made to take effect in possession, and not in such special manner after the death of the incumbent, as it appears before it ought by the law.

But it was resolved, that the appropriation was sufficient in law; for it is true, that the licence is general, and therefore it shall be taken in such sense, that it may take effect, and that is, to be appropriated after the death of the incumbent: and when the letters patent may be taken to two intents good, in many cases they shall be taken to such intent as is most beneficial for the king; but if the letters patent may be taken to one intent good, and to another intent void; then for the king's honour, and for the benefit of the subject, they shall be taken in such manner that the king's grant shall take effect; for it was not the king's intention to make a void grant, and therewith agree 21 *E.* 4. 44. *b.* and *Roger earl of Rutland's case*, in the eighth part of my Reports, fol. 56. *a.* which is proper to be perused, and in the lord *Stafford's case*, in the same part, fol. 77. *a.* and the case of *fir J. Molins*, in the sixth part of my

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Reports, 6. a. and the lord *Chandos'* case, in the same part, fol. 55. b. and the earl of *Cumberland's* case, in the eighth part of my Reports, fol. 167. a. And so it was resolved in the principal case, that the licence shall be taken to this intent, to make the appropriation to take effect after the death of the present incumbent; and *eo potius*, because the letters patent were *ex certâ scientiâ et mero motu*. And therewith agrees a record in the book of entries, *tit' quare impedit, divisio' appropriation*, where the licence of appropriation was general, and the appropriation after the death of the incumbent in these words, *volens et concedens ut cedente vel decedente ipsius ecclesiæ nunc rectore, quod prædictus abbas et conventus ejusdem ecclesiæ corporalem possessionem apprehenderent, ac fructus, proventus et obventiones perciperent et libere haberent*. And *vide in eodem libro, tit. Dicit 1.* As to the second reason, that is mistaken; for it appears by the instrument of appropriation found within the record, that it was by express words to take effect after the death of the then incumbent, *ita quod cedente vel decedente rectore dictæ ecclesiæ qui nunc est, &c.* Another reason was added, that inasmuch as always the king's licence of appropriation is made to the body spiritual, to which the church shall be appropriated, and not to the bishop, &c. therefore it shall be presumed, that they would obtain it in such form that it should avail them. Also the licence of appropriation is always general, and so are all the precedents; for although the rector be alive at the time of the making of the licence, he may die, or resign, &c. before the appropriation.

As to the second point, admitting the said appropriation had been void, it was objected, that the said act of 35 *Eliz.* has made it good; for thereby it is enacted and declared, "That all manors, lands, tenements and hereditaments, which at any time heretofore were the possessions of any abbey, monastery, priory, &c. which after the said fourth day of *February*, in the 27th year of *H. 8.* were granted or conveyed, or mentioned to be granted or conveyed, in or by any letters patent whatsoever, made by the said late king *H. 8.* to any person, &c. were and shall be reputed, taken, and adjudged to have been lawfully and perfectly in the actual and real possession of the said late king, and of his heirs and successors, at such time as the same were granted by the said late king." And where it was answered by the plaintiff's counsel, that the said act of 35 *Eliz.* extended only to letters patent made by king *H. 8.* and the letters patent in the case at bar, were made by queen *Elizabeth*, and so out of the said act of 35 *Eliz.* it was resolved.

resolved, that in truth the said act of 35 *Eliz.* did not extend to this case, but not for the cause alleged by the plaintiff's counsel; for although it is true, that queen *Elizabeth* granted the inheritance of the said rectory, yet it appears by the special verdict, that king *H. 8.* by his letters patent indented had demised the said rectory to *William Petre* doctor of law for 21 years: and the act of 35 *Eliz.* enacts, "That all manors, lands, tenements, and hereditaments, mentioned to be granted or conveyed in or by any letters patent whatsoever, made by king *H. 8.* to any person or persons, bodies politick or corporate, shall be reputed, taken, and adjudged to have been lawfully and perfectly in the actual and real possession of the said late king, and his heirs and successors;" in which purview four things were observed: 1. The favourable penning thereof, *sc.* mentioned to be granted; although in effect nothing passed by the grant. 2. The generality of the words. First concerning the quality of the letters patent, *sc.* in or by any letters patent whatsoever, be they under the great seal, the exchequer seal, the court of augmentation seal, the dutchy seal, &c. Secondly, concerning the estate or interest which is mentioned to pass by the letters patent, which is left at large, and not restrained to any in certain; and therefore if the letters patent purport a grant for life, or for years, the statute hath as great operation, as to the purview of the act, as if the letters patent had purported a grant of an estate tail, or a fee. 3. The generality of the purview, for it extends not only to make the grant good, but to vest the manors, lands, tenements, and hereditaments of the late abbots, &c. in the actual and real possession of king *H. 8.* 4. And not only in king *H. 8.* but in him, his heirs and successors, so that the lands shall be as well vested in the king, his heirs and successors, when the king grants the land for life or years, as where he grants it in fee-tail or fee-simple: and so the purview extends to three other cases. 1. Where any such lands, tenements, or hereditaments: "came to the hands or possession of the said late king *H. 8.*" 2. Or which were put in charge to or for his highness in his court of exchequer, or any other courts of his majesty's revenue. 3. Or by any auditor, or other officer of the said late king;" and in every of these cases the purview hath so great operation, as in cases of letters patent to vest such lands, tenements, or hereditaments, in the king, his heirs and successors. But yet it was resolved, that the said act of 35 *Eliz. c. 3.* did not extend to this case; for the purview has a qualification or restraint which has not been mentioned before at the bar; and that

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is, that in the said four cases, such lands, tenements, and hereditaments, "shall be reputed, taken, and adjudged, in the actual and real possession of the said late king, his heirs and successors, at such time as the same did so come to his majesty's hands or possession, or were so put in charge or granted, or conveyed by the said late king H. 8. as aforesaid; (then comes the qualification or restraint), notwithstanding, 1. any defect, want, or insufficiency of or in any surrender, grant, or conveyance of the said manors, lands, tenements, or hereditaments, or any part thereof, to the said late king H. 8. 2. Or any other matter or cause whatsoever, by which his highness was or might have been entitled to the same:" so that the scope and purpose of the act was to vest in king H. 8. all the lands, tenements, and hereditaments which the abbots, &c. had, notwithstanding the defects aforesaid. But, if the said approbation was void, and was not given the king by the statute of monasteries, then the prior of *Montacute*, in the case at bar, had nothing in the said rectory, but the advowson only, and *jus præsentandi*: but yet the said act of 35 *Eliz.* is of great use and effect, for inasmuch as the statute of 31 H. 8. gave not the king any monasteries, priories, &c. but only such as had been surrendered, granted to the king, &c. or were dissolved; or as should be surrendered, granted, &c. or dissolved; this act, in the said four cases, has supplied the defect or want of a surrender, grant, or conveyance, also of an insufficient surrender, grant, or conveyance, so that be there any conveyance to the king, or not, and if any be, although it be insufficient, the said lands, tenements, and hereditaments, are actually vested in the king, his heirs and successors. 2. If the abbot, prior, &c. had been disseised, or in any other case, where an office, *scire facias*, seisure, &c. was requisite to vest the possession in the king; there the latter words, *viz.* "or any other matter or cause whatsoever, by which his highness was or might have been entitled to the same," supply all such means by which the king might have been lawfully entitled, and put in actual possession. *Vide* 33 H. 8. *Brook, tit. Chose in Action* 14. the question there made, where an abbot, &c. was disseised, well explained and resolved. But although there be defect in the appropriation, yet (if the rectory be in reputation appropriate, and so has been used) it is given the king by the statute of 27 H. 8. c. 38. or 31 H. 8. c. 13. and therefore in 19 *Eliz.* in the dean of *Paul's* case, it was adjudged in the king's bench, that a chantry or college, in reputation and not in law, was given to king E. 6. by the statute of 1 E. 6. within these words, "all and all manner of chantries, colleges, leges,"

"leges," &c. On 27 Junii, anno 29 Eliz. in cancellar' upon an aid prier of the king, by the course of the common law, the case was between the lord St. John plaintiff, and the dean and chapter of Gloucester defendant, for the parsonage impropriate of Penmark in the county of Glamorgan; because the patron (who before the appropriation had granted the advowson to the body ecclesiastical, to which the appropriation was made) in anno 18 R. 2. was but tenant in tail, and yet it always continued as a church appropriate: and it was resolved by sir Thomas Bromley, lord chancellor of England, Gilbert Gerrard, master of the rolls, Shute and Windham justices, (whom the lord chancellor in that case associated unto him), that this rectory in reputation was given to the king by the statute of monasteries. Another case was, Tr. 30 El. in camera scacc' inter T. Grimes and H. Smith, for the parsonage of Bulbenham, in the county of Leicestershire, which, anno 22 E. 4. was appropriated to the abbey of Sulby, and no vicar endowed there, &c. according to the purview of the acts of 4 H. 4. 12. 15 R. 2. 6. But there had continued a vicar in reputation, and the rectory had continued also as appropriated; and it was resolved, that that rectory was given to the king by the statute of monasteries. Hill. 4 Jac. reg. in cancellar' inter Bedel and Bear, for the church of Kumbalton, which was appropriated in anno 40 E. 3. and the defect was, that Humphrey de Bohun earl of Hereford (who granted the advowson of the said church to the body ecclesiastical, to which the appropriation was made) was but tenant in tail; and resolved clearly, that it was given to king H. 8. by the statute of monasteries. Nota reader, In the statute of monasteries there is a saving of rights, &c. but the founders, donors, &c. are excepted out of the saving; so they are bound by the body of the act.

Supra 158.

As to third point upon the verdict, it was resolved, that so far as the special matter found by the jury was not parcel of their charge, nor pertinent to the issue, (admitting that the special matter had been sufficient to have barred the plaintiff of the tithes), it should not be regarded; for the party grieved thereby cannot have attain, nor the witnesses punished for perjury by the statute of 5 El. because neither the saying of the jury, nor the testimony of the witnesses, was material to the issue; so that inasmuch as the issue is joined upon prescription in the prior and his predecessors, to hold the said 22 acres discharged of tithes *a tempore cujus*, they cannot give in evidence a unity of the rectory and land for 10 years only; that if any colour should be, that the same should be a

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discharge, it is not a discharge by prescription *a tempore cujus*, &c. by the common law, but by the statute of 31 H. 8. So that for the insufficiency and impertinency of the points and parts of this prolix record, the other justices did not speak to the fourth point of the verdict. But the chief justice (for the better direction of this and such other cases) did declare, that the point had been resolved before, and the causes and reasons of the resolution thereof. It was a long time in all the courts at *Westminster*, a great question upon the said branch of the statute of 31 H. 8. and the cause of the doubt thereof stood upon two considerations: 1. Upon consideration of the nature and quality of tithes before the said act. 2. Upon the words and purview of the said branch of 31 H. 8. And as to the first, *quota pars*, i. *decima pars*, which we call tithes, is an ecclesiastical inheritance collateral to the estate of the land, and of their proper nature, due only to an ecclesiastical person by the ecclesiastical law, and therefore no unity of possession can either extinguish or suspend them; but they, notwithstanding any unity, remain *in esse*, so that they may be demised or granted to any spiritual man, notwithstanding any such suspension. Tithes are more collateral to land than a warren, which the owner of the land has in it; for, by feoffment of the land, without excepting the warren, the warren is extinct, as it is held in 35 H. 6. 56. a. But, if a prior, who has a parsonage impropriate, enfeoffs another of part of the glebe, yet he shall have tithes against his own feoffment, as it is held in 42 E. 3. 13. a. and they are not like a leet; and yet if the lord of a leet purchases land within it, his leet is not suspended, nor (if he makes a feoffment of the said land) is his leet in it extinct, as it is held in 7 E. 2. tit. *Avowry* 211. and 8 Ed. 2. *ibid.* 212. But he has an inheritance by the common law in the leet, which is descendible, and which he may grant over to whom he pleases: but such inheritance a lay-man cannot have in tithes by the common law, neither shall they pass by such words as temporal inheritances shall pass, and therefore *Mich.* 31 & 32 El. in a prohibition betwixt *John Parkins* and *Thomas Hinde* parson of *Babington* in the county of *Somerset*, the case was, that the said parson by deed indented leased his glebe *cum proficuis et commoditatib' eidem spectantib'* for 95 years, rendering rent *pro omnibus exactionib' et demandis quibuscunque dñe rectorie pro claus. prædicto spectantibus*; and the question was, if the lessee should have the said close discharged of tithes during the term: and it was resolved *per totam curiam*, that the tithes should not pass by such general words, and

Supra 161.

as they are tithes not severed, they are merely ecclesiastical; for the subtraction of which no remedy lies by the common law. If a parson purchases land within his rectory, and leases this rectory, the lessee shall have tithes of the land purchased, and therewith agrees 30 H. 8. *Eyer* 43. pl. 21. Vide 32 H. 8. *Brook tit. Dismes* 17. Then inasmuch that if tithes be considered of themselves before the severance of them, they are merely ecclesiastical, and so collateral to the estate of the land, that no unity can extinguish or suspend them, but notwithstanding any unity, they remain *in esse*; now the words of the act are to be considered, which are, “that as well the king, his heirs and successors, as all and every such person and persons, their heirs and assigns, which have, or hereafter shall have any monasteries, parsonages appropriate, or other hereditaments, &c. shall have, hold, retain, keep, and enjoy, as well the said parsonages appropriated, &c. messuages, lands, tenements, and other hereditaments, &c. discharged and acquitted of payment of tithes, as freely and in as large and ample manner as the said late abbots, priors, &c. had held, occupied, possessed, used, retained, or enjoyed the same at the days of their dissolution:” and upon these words, forasmuch as the unity doth not discharge nor suspend the tithes, but that they were *in esse* at the time of the dissolution; and forasmuch also as these words (discharge and acquit) imply actual immunity and freedom; and that the king and his patentees shall not have them discharged and acquitted absolutely, but *sub modo*, that is to say, “in as large and ample manner, &c. as the said late abbots, &c.” and the late abbots held not the said lands in case of unity discharged, but charged with the payment of them; for these reasons in short it was doubted, whether the said act should extend to the case of a perpetual unity; and it was also urged, that if the said act of 31 H. 8. in case of perpetual unity should, in respect thereof, discharge the land of tithes, it would do a wrong; and as it is said in *Plo. Com.* in the earl of *Leicester’s* case, 398. b. the parliament is a court of the greatest honour and justice, of which none ought to imagine a dishonourable thing; and the *Doctor and Student*, fol. 165. cap. 55. It cannot be thought, that a statute that is made by authority of the whole realm, as well of the king, and of the lords spiritual and temporal, as of all the commons, will recite a thing against the truth, &c. And *Fortescue* c. 18. *prudencia etiam et sapientia necessario statuta hujus regni referta putandum est, dum non unus aut centum solum consultorum virorum, sed plusquam trecentorum*

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electorum hominum, quali numero olim senatus Romanorum regebatur, ipsa sunt edita.

But at length, upon great consideration, it was resolved and adjudged, that a perpetual unity *a tempore cujus, &c.* till the dissolution, should be *prima facie* a discharge of the land of payment of tithes, by force of the said branch of 31 H. 8. c. 13. for divers reasons. 1. The statute doth not say discharged of tithes, but discharged of payment of tithes, and for divers other reasons, the chief of which was, for the infinite impossibility and impossible infiniteness, so that such immunities and discharges as religious houses had before time of memory cannot be known. And it was expressly resolved, that a general allegation of unity at the time of the dissolution, *&c.* without an averment that it was perpetual, was not sufficient: and although it had been a perpetual unity, yet, if the farmers of the lands of the rectory had paid tithes before the dissolution, then the intendment and presumption of law upon the perpetual unity failed: and all this you may see in the archbishop of Canterbury's case, in the second part of my Reports, and divers judgements and resolutions there cited, fol. 48 & 49. So that such unity as is within the said branch of the act of 31 H. 8, ought to have four qualities. 1. *Talis unitas* ought to be *iusta*, rightful and not by wrong. 2. It ought to be *equalis*, *s. fee* in the one and the other; for if the abbots, priors, *&c.* have held by lease, *a tempore cujus, &c.* that is not a unity within the statute. 3. It ought to be *perpetua a tempore cujus, &c.* 4. It ought to be *libera*, free of payment of any tithes: but, if their farmers at will, for years, *&c.* have paid tithes to them, (as hath been said), the unity perpetual will not serve. But it was asked, what if the appropriation was made in the times of E. 4. H. 6. H. 4. R. 2. E. 3. *&c.* and yet in law within time of memory, and unity had continued from the time of the appropriation until the dissolution, and tithes were never paid, neither by the abbots, *&c.* nor their farmers: should not the statute extend to those cases? and it was answered, no, upon the point of unity; for if he will take the aid of the act of 31 H. 8. the unity, as hath been said, ought to be perpetual. But in such case he may allege the said branch of the act of 31 H. 8. concerning the discharge of payment of tithes, *&c.* and that the abbots, *&c. a tempore cujus, &c.* until the dissolution, have held the land discharged of tithes, (as he may well prescribe by the common law), and give such evidence that he may approve it: and so if in truth, the land be discharged,

arged, he has sufficient remedy to relieve himself. *Vide* the top of *Winchester's* case, in the second part of my Reports, fol. b. 45 a. But, if the abbey or priory, &c. was founded within e of memory, then he cannot prescribe *omnino*; and forasmuch n the principal case, the appropriation was made in 20 H. 8. hat it appeared to the court, that before that the 22 acres were rged with tithes; for of common right all lands ought to pay es; for that reason the chief justice concluded, that the said 22 s were, as this case is, chargeable with tithes. But, if the par- are not satisfied with it, they may begin again. For inasmuch he information, as it is resolved, is good; and the plea, *pro ultatione habenda*, altogether insufficient; and the verdict im- nient to the issue, they would not grant a consultation; and eunto the whole court agreed.

Hil. 10 Ja. A. D. 1613.

Arnold v. Bidgood. [Cro. Ja. 318.]

EBT upon the statute 2 E. 6. c. 13. for not setting out tithes. The case was; a man being possessed of a lease of tithes in it of his wife as executrix to her former husband, grants *totum titulum et interesse suum de et in decimis prædictis*. After verdict the plaintiff (who claimed under the said grant), it was moved rrest of judgement, that the declaration was not good, because plaintiff had not set forth any good title to enable himself to the es. And the books of 10 E. 4. 1. & 19 H. 6. 40. were cited he purpose. But the whole court unanimously resolved, that grant was good, and the lease he had in the tithes in right of *feme* did thereby pass: for he granted *totum jus, titulum et in- esse suum de et in decimis prædictis*. And, by *Doderidge*, the word n doth import a propriety in possession, and is all one as if he specially named the same in the grant; nor could it be more ainly named or expressed. There was then an objection made of the proviso in the statute for dissolutions, that all leases le by any abbot within a year before the dissolution, should be 1; and this lease was pretended to be so, and therefore void. it was thereto answered, that here the issue was only, whe- he were discharged of tithes or not: and the jury gave their dict directly, that at the time of the dissolution there was not any

Grant of
*totum jus
suum in de-
cimis* passes
a lease of
them which
the grantor
has in right
of his wife.
2 Bullstr.
65. S. C.
3 Will. 278.
& 2 Bl. Rep.
801. S. C.
cited by De
Grey, C. J.

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any discharge of tithes: and this lease being but an inducement only to the title of the plaintiff, the issue therefore is well enough. But, if in this case there had been any mispleading or mistrial, the court held clearly it was aided by the statutes of 32 H. 8. & 18 Eliz. cap. 14. and cannot be qualshed after verdict: whereupon judgement was given, and entered for the plaintiff.

P. 11 Ja. C. B. A. D. 1614.

Urrey v. Bowyer *. [MSS. Calthorpe.]

Q. Whether the lands of the hospital of St. John of Jerusalem shall be discharged of the payment of tithes.

BOWYER libelled in the spiritual court against *Urrey* for tithes of corn. *Urrey* suggested that the lands of which the tithes were demanded were in the hands of *Richard Weston* prior of St. John's of Jerusalem in England and of his brethren, and that they were discharged of tithes in their hands: he then shewed that all the lands were given to the king by the statute of 32 H. 8. c. 24. and pleaded that statute which gives to the king all immunities, privileges, jurisdictions, &c. which the prior, or any of his predecessors had; and set forth farther that the king by his letters patent granted these (the said lands) to the now plaintiff in prohibition, with a clause therein that he should have *tanta, talia, tot immunitates, privilegia, &c.* as any one had had theretofore, &c. and so he prayed a prohibition. Upon this suggestion in the prohibition *Bowyer* demurred. And *Coke* C. J. argued that the suggestion was insufficient, and that these lands ought to be charged with tithes, and could not be discharged thereof. And of that opinion was *Nicholls* J. But *Warburton* and *Winch* held, that the lands ought to be discharged of tithes; and their reason principally was, for that the statute of 32 H. 8. c. 24. revives all privileges, jurisdictions, immunities, &c. which the Hospitallers had enjoyed, and they insisted much upon the book of 10th of *Eliz. Dy.* But I heard neither their argument nor that of *Nicholls*, and therefore have not reported them: but I have only reported *Coke's* argument, which I did hear.

* The arguments of the counsel in this case are reported in 2 Brownl. 8. 20. but as this question was debated upon several occasions *vario Marte*, and as the report of those arguments is not a very correct or finished one, I have thought it unnecessary to insert it here. This argument of my lord *Coke* is no where in print.

Coke held, that the statute of 31 H. 8. c. 13. did not extend to the possessions of the Hospitallers, because they were dissolved by an act of parliament subsequent to it; and the statute of 32 H. 8. c. 24. which revives the immunities and privileges of the dissolved monasteries does not extend to them, because the privilege of being discharged of tithes is a privilege inseparable from the person of the prior. He said, there were four orders that were discharged of tithes by a general council and by a decree of the pope, *viz.* the Cistercians, the Templars, the Hospitallers, and the Præmonstratenses; and all other orders were to pay tithes as other persons; and even these privileged orders were to pay tithes *de terris de novo acquisitis*, and as to those were not discharged. And the words of the council are, that the said orders and their successors shall be discharged of tithes for their lands so long as they retain them in their own hands. So that it appears by the words of the council, that if the lands be transferred to the hands of any other persons, the privilege is gone, and they become charged with tithes again; for the *medium dispositivum* of the bull or council which discharges them of tithes is ecclesiastical; the persons, who are discharged, are ecclesiastical; and the thing itself whereof the discharge is made is ecclesiastical. It seems to me then that there is great reason that this privilege should not be transferred to persons who are not ecclesiastical; and for whom none of those reasons can be alleged why they should be discharged of tithes. It is besides a thing that was never seen, that inseparable privileges were either given to the king, or contained within the general words of an act of parliament. Though the statute respecting the Templars made in 17 E. 2. wills that the Hospitallers, to whom the possessions of the Templars were transferred, shall hold by the same tenure and the same services which the Templars held by, yet the immunity of the tenure in frankalmoigne was not transferred from the Templars to the prior of the hospital of St. John of Jerusalem and his brethren, as was adjudged in 35 H. 6. 56, 57. And yet in that act the words were special; and the persons to whom the transfer was to be made were of the same quality with the persons from whom the possessions were taken. In 3 E. 3. 11. an appropriation is not transferred from the Templars to the Hospitallers, notwithstanding the statute of Templars wills that the prior of the Hospitallers shall have all the possessions which belonged to the Templars; for the appropriation is inseparably annexed

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nexed in privity to the Templars; and cannot be transferred by the general words of an act of parliament. The statute of 33 H. 8. c. 20. gives all manner of conditions to the king; and yet by force of these general words a condition inseparably annexed to the person of the party attainted is not given to the king, as was adjudged in *Inglefield's case*, 1 *Anderf.* 293. So by that statute a right of action shall not be given to the king, notwithstanding that the statute gives all rights generally; for it is a thing confining in privity, and therefore shall not be transferred by the general words of an act of parliament, as may be seen in the *marquis of Winchester's case*, 3 Co. 2. So in the case at bar, as the immunity of being discharged of tithes is, so long as the land shall remain in the hands of the Hospitallers, and therefore is inseparable from their persons; for that reason it shall not be transferred by the general words of the act of 32 H. 8. c. 20. Besides, there is no instance of the general words of an act of parliament being extended to tithes. For tithes being a spiritual thing, and due *jure divino*, *quoad* a competent maintenance, and not *jure humano*, the common law does not take any notice of them in an act of parliament, which is but a temporal conveyance, and means not to meddle with them. And for this reason it is that there is never any saving in an act of parliament of tithes, though there is a saving of all seignories, rights, rents, and all other things. For tithes being a thing collateral to the land, and not being a temporal inheritance, are not included within the general words of an act of parliament. And for this reason the statute of 3 H. 5. c. 1. which grants that men shall enjoy their liberties and franchises does not extend to this, that they shall enjoy the liberty of being discharged of tithes. And so, though the statute of 27 H. 8. c. grants that the king shall have all privileges, &c. and all hereditaments whatsoever, in as ample and large a manner as the abbots, &c. had them; yet the king by these general words shall not be discharged of tithes; for all the possessions which came to the king by this statute remain charged with tithes at this day.

And here *Coke* said, that though tithes are due *jure divino*, *quoad* a competent maintenance, yet unquestionably as to the tenth part, and neither more nor less, that is due *jure humano*, and by the constitution of man. And he said that tithes are not assets, nor are they extinguished by a feoffment of the land, nor is a common person capable of them at common law; and that so it appeared by what

had been said, that the statute of 32 H. 8. does not extend to an immunity which is inseparably annexed to the person.

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It is now to be inquired, whether that statute extends to a privilege which is ecclesiastical and spiritual, and not temporal. And as to that, he said, the statute extends only to the reviving of the temporal franchises, and not the spiritual ones. For if it should extend to the spiritual liberties, then a great inconvenience would ensue, because by this means all the possessions of the Templars, would be exempt from all temporal jurisdiction as they were when they were in the hands of the Hospitallers, as may be seen in 1 E. 3. 8. & 31 E. 3. *Triall* 99. where it is holden that profession alleged in a plaintiff of the order of Templars cannot be certified by the bishop, because the order is exempted by the pope from episcopal jurisdiction. And if they had all ecclesiastical privileges which the Templars had, this would bring a great inconvenience to the commonwealth, a greater indeed than a man would imagine. For the Templars had many great immunities bestowed upon them by the pope and councils, which immunities they might as well claim as to be discharged of tithes; and therefore because the law forbids those who have now their possessions to claim those privileges, it will also forbid them to claim the ecclesiastical privilege of being discharged of tithes. And as to the 3d privilege, which is a privilege of discharge, and not in being, he said, that the statute of 32 H. 8. c. 20. does not extend to it; for the statute says, that *the privileges, &c. shall be actually and really in the king, his heirs and successors*; and a privilege of discharge, which is not *in esse*, cannot be actually and really in the king. Besides, the statute says, that *all franchises, &c. of what nature soever they may be, lawfully had, used, and exercised, &c.* but a franchise of discharge cannot be used or exercised, because it is not *in esse*, and therefore the statute does not extend to it. In 7 H. 6. 8. where the abbot in a writ of *tosinage* brought against him pleaded to the jurisdiction of the court, because the lands lay within the abbey of *Westminster*, which is a privileged place, the plea was disallowed, the privilege and immunity extending to the person only, and not to the lands or goods. According to 11 H. 4. 35. though the prior of St. *John's* were discharged of taxes and subsidies in respect of his person, yet the occupiers of the lands shall not be therefore discharged, because the discharge was solely in respect of the person, and not in respect of the lands. In 38 & 39 of *Eliz.* in the case of the lord *Darcy* it was adjudged, that where the king

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king granted to the dean and chapter of *Paul's* and their successors that they should be discharged of purveyance in their manor of *D.* and the manor was afterwards surrendered into the king's hands in 33 *H. 8.* the king's patentee should not be discharged of purveyance, though the patent ran that he should have *tot, talia, et tanta privilegia, franchiseas, libertates, &c. quot, qualia, quanta aliquis habuit*; for this discharge of purveyance is a personal thing, and not *in effe.* 1 *H. 7. 25.* a grant was made to the abbot of *Abington* that he should be discharged of episcopal jurisdiction: in that case it would be absurd to say, that he who should have the possessions of this abbey, should have the privilege of discharge. 20 *E. 3. Excommement*, the abbot of *E.* had the privilege of being exempt from any ordinary jurisdiction; here the statute of 32 *H. 8.* would not revive this privilege, because it is a privilege of discharge, and a personal privilege. In 44 and 45 *Eliz.* in a *quo warranto* brought it was adjudged, that a privilege of being discharged from the government of the mayor and aldermen in *London*, was not revived by the statute of 32 *H. 8.* so that the defendants claiming under a dissolved monastery, could not claim all franchises. *F. N. B. 227. Reg. 259.* we see that all ecclesiastical persons were discharged of toll, murage, pontage, &c.; yet the persons who have the possessions of those ecclesiastical persons shall not be discharged of them; for it is a personal privilege, and a privilege not in being. The statute* of 14 *E. 3. c. 1. ff. pro Clero*, grants that *ecclesiastical persons shall be discharged of receiving guests or sojourners of Scotland, &c.*; this privilege of discharge does not extend to those who have their possessions, nor is it revived by the statute of 32 *H. 8.* Whence we see that the statute of 32 *H. 8. c. 20.* does not revive privileges which go in discharge, and are not *in effe.*

* Vide Raft. Statutes, Tit. *Purveyors*, § 12.

It now remains to examine whether the statute of 31 *H. 8. c.* can in any way extend to this case. As to that when a thing is out of the body or purview of an act, it shall never come within the branch of it. For how is it possible that there can be sap in the trunk, when there is none in the root? How can it be that this dissolved hospital should be within the branch of the 31 *H. 8.* which gives immunity from tithes, when it is not within the body of the act? And this dissolved priory of *St. John of Jerusalem* is not within the body of the act, because it was given to the king by an act of parliament passed in 32 *H. 8. c. 24.* and not by this act. Besides, this statute of 31 *H. 8.* is very precise in its penning;

ning; for it says, *that all houses of religion, &c. which have been dissolved since the 4th of February, &c.* so that the house or priory that would have the privilege of being discharged of tithes within this act, must have come to the king since the 4th of February. And it is for this reason, that this statute does not extend to those priories and religious houses which were dissolved by the statutes of 4 H. 5. c. and 27 H. 8. c. 28. The statute too says, that the said possessions shall be discharged of the payment of tithes; so that the lands, which are to be discharged of tithes within the statute, must be those possessions which came to the king by the statute; for the word "*said*" runs from the branch to the body of the act, so that nothing shall be within the branch which is not contained within the body, and therefore because these lands do not come to the king by the 31 H. 8. they shall not have the immunity of being discharged of tithes. And it is for this reason that neither the lands that come to the king by the statute of 32 H. 8. c. 13. nor those which come to him by the statute of 1 E. 6. c. of chantries, are discharged of tithes by the branch of the statute of 31 H. 8. c. 13. For how can it be intended that the statute should provide for the lands of those houses that might be dissolved thereafter, unless you will say that the makers of the act of 31 H. 8. had the spirit of prophecy? And so it was resolved in the *bishop of Canterbury's case*, 38 Eliz. 2 Rep. 44. And in the case of one *Greene and Buffkin*, 2 Rep. 49 b. and Hil. 44 Eliz. Rot. 994. in an action on the statute of 2 E. 6. it was the opinion of all the judges except *Gawdy*, that the branch in the statute of 31 H. 8. which gives immunity from tithes, does not extend to possessions given by the statute of 32 H. 8. And so it was ruled in the case of *Quarles v. Spurling*, who were the same parties between whom the action on the statute of 2 E. 6. was depending. As to the case in the 10th of Eliz. Dy. 277. which had been so strongly urged, he said, first, that it was a case ruled upon sudden opinions given before the lord chancellor, and not upon solemn argument. 2dly. He said, that the case was in truth upon the order of *Cisterians*, as he had seen by the papers in chancery, though lord *Dyer* states it to be of the order of *Templars*; and by the recital of the act of 2 H. 4. c. 4. it appears, that lord *Dyer* understands it so, because the statute of 2 H. 4. intends only that the farmers of the Cisterian order pay tithes, and does not speak of the order of *Templars*; and the Cisterian order are clearly discharged of tithes, because their lands came to the king by the 31 H. 8.

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H. 8. • But admitting the case to be as it is stated in the book, yet inasmuch as there have been four judgements adjudged differently upon the point against the book, it is good to abide by the latter judgements, as *Plowden* saith. And here *Coke* said, that such possessions as are discharged of tithes by the branch of the statute of 31 *H. 8.* must have been in the hands of religious and ecclesiastical persons at the time of the dissolution. For if they were in the hands of *religious* persons only, and not of *ecclesiastical* likewise, then such possessions will not be discharged of tithes by that act, because the act always speaks in the copulative, *religious and ecclesiastical*, and not otherwise. But here he said, that the Templars were holy persons, who were capable of being discharged of tithes, if there were no impediment in the case. They were both *religious and ecclesiastical*, for an order cannot be religious without being ecclesiastical; though an order may be ecclesiastical, and yet not religious, as a bishop, dean and chapter, archdeacon; they are ecclesiastical, but not religious, because they are not regular, and have not professed themselves, nor vowed three things, *viz.* obedience, voluntary poverty, and perpetual chastity, which things are requisite to such orders as are said to be religious, as may be seen in 2 *Rep.* 48. But the Templars are religious, because they are professed persons, as may be seen 35 *E.* 1. *Tryall* 99. 2 *R.* 3. 4. and also 9 *E.* 3. 25 and 26. 12 *R.* 2. Nonability 4. 8 *E.* 3. 53. where it is admitted that the prior of the hospital alone shall sue and be sued without naming the brothers, they being dead persons in law. They were also ecclesiastical persons, for they might sing mass, as may be seen in the statute of Templars, 17 *E.* 2. which no one could do who was not an ecclesiastical person. So that it appears that they were both religious and ecclesiastical, and of course entitled to the aid of the statute of 31 *H. 8.* if there were no other impediment in the case. And here *Coke* said, that the prohibition is insufficient of itself, inasmuch as the suggestion is, that *the prior of the hospital of St. John's of Jerusalem and his brethren were seised*; whereas it ought to be that *the prior of the hospital of St. John's of Jerusalem was seised*, for the brothers are persons dead in law, who cannot be said to be seised. And therefore we see in 1 *E.* 3. 7. that the prior of *St. John's of Jerusalem* in England avowed without making any mention of his brethren. So in 1 *E.* 3. 9. it is said that the Templars and Hospitallers are professed persons, and their profession shall be tried by the common law and not by the ordinary, because they are out of his

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his jurisdiction. And in 7 E. 3. 25. 1 R. 2. *Nonability* 4. 8 E. 3. 53. the brothers are never mentioned in any suit by or against the prior of the hospital. And here *Coke* took occasion to speak of the first institution of the Templars and of their dissolution. The first institution of the Templars, he said, was to conduct Christians to the holy land safe from robbers and pagans, as may be seen in *Matthew Paris*, fo. 67. and as *Pole* says in 9 E. 3. 25. the lands upon their foundation were given to the Templars in defence of the Christians against the Saracens; and as *Camden* says, their institution was *ad defensionem Christianorum terræ sanctæ adversus Paganos et Saracenos*. So that they were a kind of soldiers and *militiæ dediti*, and did not fight with their pen, as other orders did, but with their swords; and they were *gladio cincti*, and always upon the mention of the gospel drew their swords in sign that they were ready to maintain the gospel with their swords; *et fuerunt induti vestimento nigro modo Laicano gerenti signum crucis ante et post*; and as the learned *Camden* tells us, fo. 340. they had in all christendom 9,000 manors for their maintenance, as the Hospitallers had 19,000; and they were always entombed together in their complete armour, as the monks were always interred in their clothes. But the Templars, though a religious order, were persons of great impiety; for the emperor Frederick having an intention of going on a pilgrimage to the place where *John the Baptist* preached, they treacherously wrote to the Sultan, and gave him notice of it, in order that he might surprize the Emperor, and by that means obtain a great ransom. But the Sultan, as soon as it was disclosed to him, informed the Emperor of it. And the French king, in requital as some say, prevailed with the Pope to dissolve the order; for in a council holden in 1312 at *Vienne*, the Pope said, *quanquam de jure non possumus, tamen plenitudine potestatis nostræ ordinem illum Templariorum reprobramus*. And in consequence of this decree made by the Pope at that council, the whole order was dissolved in *England* by the statute of 17 E. 2. But the true cause of their dissolution is to be traced to other motives of the French king*. All the Templars were gentlemen of the best quality; and the order of Hospitallers was rectified a long time before the dissolution of the Templars, contrary

*Camden's
Britannia,
Middlesex.*

*M. Paris
358.*

* The principal cause of *Philip the Fair's* hatred against the Templars was, that, in a quarrel with *Boniface VIII.* the Knights espoused the cause of the Pope, and furnished him with money to carry on the war, an offence this which *Philip* could never pardon.

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to the opinion of *Rastal* in his title of *Templars* in his statutes, where he says that they commenced at the time when the *Templars* were dissolved. And *Coke* farther said, that long before the dissolution of the *Templars*, there were inns in which the apprentices of the law resided; for it may be seen in an old record among the *communis placita* in the hustings of *London*, that *John Tracy bene nummatus homo* devised *totum illud hospitium in Holborn in quo apprentitii ad legem habitare solebant*, whence it is manifest that they were resident in *Holborn* before the dissolution of the *Templars*.

T. 11 Ja. A. D. 1613. B. R.

Kipping v. Swayn. [Cro. Ja. 324.]

Tenant cuts corn, and before carriage his term is expired, yet must he set out his tithes.

1 Brownl.

123. S. C.

2 Bulstr.

119. S. C.

IN debt upon the statute of 2 *Ed. 6.* for not setting forth tithes, the plaintiff declares, that he was proprietor of the rectory of *B.* in the county of *S.* for the term of seven years; and that the defendant was occupier of lands within the same parish for six months, by a demise made 10 *Martii*, 10 *Jacobi*: and that the defendant 27 *Augusti* anno *prædicto*, cut his corn there growing; and upon the 10th of *September* next following, the defendant, being *subditus dicti domini regis*, carried away the said corn, not setting out the tenth, according to the statute. The defendant pleaded *nil debet*, and it was found for the plaintiff; and now moved in arrest of judgement; 1st. That the plaintiff by his own shewing had no cause of action against the defendant, for the defendant's interest in the land was determined before the tithes were carried away: but the court held it to be no exception; for, although his interest in the lands was determined, yet he remained owner of the corn; for if corn be cut down, although a stranger take it away before severance, yet an action on this statute will lie against him.

M. 11 Ja. A. D. 1613. B. R.

Wheeler v. Heydon. [Cro. Ja. 328.]

Declaration upon a lease of tithes for 6 years, if the lessor lives so long and continue parson, and these last words not

IN debt upon the statute of 2 *Ed. 6.* for not setting out tithes, but carrying away the corn, the tithes not being set forth; the plaintiff declares, that one *Thomas Rock*, parson of the rectory of *Scripton*, let unto him the rectory for six years, if he lived so long and continued parson there; and that the defendant, being an occupier of such lands sown with wheat, within the said parish, reaped and carried it

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away, the tithes not being set forth, &c. and avers the life of the said *Thomas Rock*, and that he continues parson, &c. The defendant pleaded *non debet*; and a special verdict was given, that the parson made the lease for six years, if he lived so long; and the words, *if he continued parson*, were not within the lease; and they found all other points according to the declaration; and if, &c. And hereupon it being moved and argued at the bar, all the justices (besides *Haughton*, who doubted thereof) held, that the variance betwixt the lease in the declaration and the lease found, shall not prejudice; for it is all one in substance, although it varies in words: and the addition in the declaration, *if he so long continue parson*, is no more than what the law speaks, for so the law tacitly implies, and therefore the addition thereof is no variance in substance. It is also good enough for a second reason; for the lease is not the ground of the action, nor is the declaration founded upon the lease, but upon the carrying away of the tithes, and for remedy of his wrong was the action brought; and the allegation of the lease is but an inducement to the action: and the jury finding that he hath a good lease and a good title to ground his action, although it be not in the same manner precisely as he declares, it being found for the plaintiff, he shall have judgement. But, if debt had been brought upon this lease for years, such variance peradventure would have been material, because the lease is the ground of the action; wherefore it was adjudged for the plaintiff. See for the first point 40 *Ed. 3.* 3. 12 *Ed. 3.* *Variance* 77. and for the second point, *Privd.* 32. & 191. *H. 6.* 29. 3 *H. 6.* 25.

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in the lease itself, yet good in this action of debt for tithes.
2 Bulstr. 83.
1 Brownl.
125. Moore
834. 2 Ro.
Abr. 717.
pl. 10. S. C.

M. 11 Ja. A. D. 1613. C. B.

Dr. Grant's Case. [11 Co. 16.]

THE case was, that *Gabriel Grant*, doctor in divinity, parson of the parish of *St. Leonard* in *Foster-lane*, *infra præcinctum Sancti Martini le Grand*, libelled in the spiritual court before Dr. *Musler*, official of the dean and chapter of *Westminster*, against *Edward Taylor*, farmer of a great and ancient house, called the *Dean's House*, within the precinct of *St. Martin's le Grand*, late parcel of the possessions of the abbot of *Westminster*; and alleged, that every parishioner or inhabitant having or occupying a mansion-house, shops, warehouses, cellars, or stables, within the said parish of *St. Leonard*, within *St. Martin's le Grand*, yearly every quarter of the year, at

A custom that the parishioners of *St. Leonard Foster-lane*, within the precinct of *St. Martin le Grand*, shall pay to the parson 2s. in the pound of the rent of their houses by way of tithes, is good.

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the feasts of *Enfer*, the nativity of *St. John* the Baptist, *St. Michael* the Archangel, and the birth of *Christ*, *a tempore cujus*, &c. or at least from the foundation, donation, and erection, of the said rectory of *St. Leonard*, by equal portions to the parsons of the said rectory for the time being, *nomine et loco decimar' suar'*, *juxta ratam cujuslibet viginti solidas' redditus per an. ex qualibet hujusmodi domo, shopa, sollar', cellar', sive stabulo sic tent' sive occupat' in prædicta parochia, duos solidos legalis monetæ Angliæ*, &c. and that the said *Edward Taylor* and his family did dwell in the said house three years, and had and possessed it for the same time *sub annuali redditu sexdecim librarum seu saltem 12 librarum*, &c. and so demanded two shillings in the pound, &c. The said *Edward Taylor* exhibited an information and suggestion to the court, that the late abbot of *Westminster*, and all his predecessors, till the dissolution of the said monastery which was *anno 30 H. 8.* had held the said house discharged of tithes, and alleged the statute of *31 H. 8.* concerning the discharge of payment of tithes, and conveyed to himself a lease for years, and thereupon had a prohibition; to which the said doctor *Grant* appeared, and *Taylor* declared against him to the effect aforesaid, and doctor *Grant* traversed the said prescription of discharge of tithes; whereupon issue was joined, and tried before me in *London* for doctor *Grant*: and now it was moved by *Taylor's* counsel, that upon the said libel, no consultation ought to be granted; for *de communi jure*, no tithes ought to be paid for houses of habitation, nor for any rent reserved upon any lease made of them; for tithes ought to be paid of things which grow and renew from year to year by the the act of God, *vide Registr' 54 b. F. N. B. 53. E. Br. tit. Dismes 16.* and not for dwelling-houses, or of rents issuing out of land, reserved and created only and merely by the act of the party: and therefore in the city of *London*, the parsons have two shillings and eight-pence in the pound, &c. in name of tithes; but that is by decree made *anno 1535*, which is enacted and confirmed by authority of parliament, *an. 37 H. 8. c. 12.* But *St. Martin's le Grand* is not included within the said decree and act, for it is within *London*, and not of it; and therefore remains at the common law. And in *30 E. 3. fol. 1. a.* and *38 E. 3. fol. 13. a.* by *Finchden* it is said, that the profits of the church in *London* are the oblations and obventions.

But it was resolved *per totam curiam*, that a consultation should be granted, for it may have a lawful beginning; for it may be, that for all the tithes of the land, upon which the houses are built,
this

his *modus decimandi* has been a *tempore cuius*, &c. paid; and altho' it is after built, that shall not take away the right of the parson in such case. And because it might have a lawful beginning, and that it has been used a *tempore cuius*, &c. it was therefore resolved, that a consultation should be granted.

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It was likewise resolved, that for these moduses he might sue in the ecclesiastical court, because they are in the nature of tithes, *viz. modi decimandi*; and every ancient city and borough has for the most part such custom *de modo decimandi* for their houses, for the maintenance of their parson. And as to the opinions in 30 E. 3. and 38 E. 3. it was said, that *obventio dicitur ab obveniendis*, and includes oblations, rents, or other revenues, which may well agree with the resolution before; and afterwards consultation was granted.

T. 12 Ja. A. D. 1614. B. R.

Whitaker and Tiddersdale v. Doctor Leyfield. [MSS. Calthorpe.]

DR. *Leyfield* being the parson of *St. Clement's* parish and surrogate of *Middlesex*, libelled before himself for the tithes of certain stables within his parish; and stated that by prescription he and his predecessors time whereof, &c. had used to have 2 s. in every 20 s. rent paid for the houses, and cited the defendants to answer upon their oath what rent they paid.

Qu. Whether a prescription to have so much for every 20 s. rent for houses in the neighbourhood of London be good.

Montague serjt. moved for a prohibition, 1st, because the Doctor libelled before himself, so that he is both party and judge, which is unreasonable: 2dly, because the defendants are to answer upon oath what tithes they pay, which is against the law, for *nemo tenetur prodere seipsum*: 3dly, because the Doctor demands tithes of houses, whereas no tithes are payable by law for houses except in *London*, under the statutes of 27 H. 8. c. 21. and 37 H. 8. c. 12. and these stables are in *Middlesex*, out of *London*, and so out of the statutes and decree.

The court inclined to grant a prohibition; for as to the first cause, it is a rule in law *nemo debet esse iudex in propria causa*; and they said, that if the ecclesiastical judge sit as judge where by law he ought not, the sentence he pronounces is void, and the judgment may be arrested. As to the second, they said, that the statute of 2 & 3 E. 6. c. 13. gives power to the ordinary of the diocese, where the party liable to pay the tithes inhabits, to call the party

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1614. before him, and at his discretion to examine him by a *lawful* and reasonable means, other than by his own corporal oath, concerning the true payment of personal tithes; and the statute of 35 H. 8. c. 19. goes also in confirmation of this. But it seemed to *Coke* chief justice, that the motion for a prohibition ought to be made before the oath is taken; for if the oath is once taken, it is too late, because it is then done and past. As to the third cause, *Coke* chief justice, seemed to incline that no prohibition ought to be granted; for the prescription appeared to him to be reasonable enough; because it was probable that where these stables now stand, there was formerly garden or orchard ground, for which a tithe-rent was paid; and it would be unreasonable that the parson should be defeated of his tithes by the building of houses upon such ground; and therefore in Dr. *Grant's* case it was adjudged, where Dr. *Grant* libelled in the spiritual court for the tithe-rent of houses in St. *Martin's* out of *London*, (*viz.*) 2 s. in every 20 s. rent that was paid; and a prohibition was granted upon a suggestion that all the houses were in the hands of the prior of *Westminster* discharged of the payment of tithes at the time of the dissolution by prescription; that a consultation should be awarded upon the prescription found for the plaintiff, (notwithstanding it was moved that a consultation ought not to be granted, because no tithe is payable for houses that are out of *London*); for *non constat curiæ* when these houses were built, and it might be that this *modus decimandi* was paid for the land before the houses were built, which *modus* is suable for in the spiritual court, and it is unreasonable that the *modus* should be discharged by the building of the houses. And as to the book of 38 E. 3. which saith, that no tithes are to be paid in *London*, except only offerings and obventions; he said, that this does not extend so far as that a tithe-rent may not be well paid in *London*, because *dominus* includes every manner of profit: and day being given till the next term for the granting of the prohibition, the plaintiffs in the mean time moved the court of common pleas for a prohibition, when it was granted to them.

[*The history of this case in the common pleas is thus given by my lord Hobart, pag. 10 of his Reports.*]

Doctor *Leifeild* v. *Tysdale*,

DR. *Leifeild* parson of *St. Clements* without Temple-bar, sued one *Tysdale* his parishioner for tithes of certain stables, and libelled that of common right and by prescription time out of mind, the parsons there used to have a *modus decimandi* for the houses, stables, and buildings, that is to say, after the rate of the tenth part of the yearly rent or value of the same. And so he proceeds to demand accordingly, whereupon a prohibition was desired, and the opinion of the court was, that a prohibition was to be granted; for *de communi jure*, no tithes are to be paid for the yearly rent, or value of houses; for tithes are paid for the revenue and increase of things; and therefore no tithes are paid in any such case in any cities or towns in *England*, saving in *London*, and this parish is out of *London* and the liberties thereof. Now, where there is no tithe at all *de communi jure*, there can never be a *modus decimandi*, for that is with an abatement, correction, or alteration of the tithe *in specie*. And yet it seems that this kind of payment had been long used here about *London*, which certainly was by use; for when the statute gave it in *London*, the parts adjoining gained the same by that colour, and even in *London* it must be sued for according to the form prescribed by the statute. But for houses oblations were paid in all places, and now by the statute were brought to a certainty, that is, a groat for a house.

And in *Mich. 12 Ja.* the case was moved again by *Harris* for the Doctor, who said that by a special custom such a form of tithing would stand in any place, and said that Dr. *Grant* had a consultation in this court upon argument in the very same case for 2 s. in the pound in *St. Martin's le Grand*, which was not within the statute; for it is a liberty exempted from *London*, and is no part of *London* nor of the liberties of *London*: and the reason was, because it may be supposed that such form of tithing was used for the land itself before it was built upon, and then the building cannot take it away: and therefore it is now directed by the court that they shall declare upon the prohibition, and then proceed to judgement.

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Tr. 12 Ja. A. D. 1614. B. R.

Prowse v. Dr. Leyfield. [MSS. Calthorpe.]

Where a discharge is claimed from unity of possession, it must be stated that the religious house was founded before time of memory.

THE proprietor of the rectory of *Old Chye*, a parsonage impropriate, libelled against *Prowse* for the tithes of three acres of arable land and three acres of pasture. *Prowse* upon the suggestion which he made, obtained a prohibition, and declared that *William* abbot of *Chye* was seised of the rectory of *Old Chye*, and of the lands whereof the tithes are demanded, *simul et semel* from the time of the foundation of the abbey to the time of its dissolution; and that he being so seised made a lease of the lands and of the tithes of corn and of the small tithes in the 9 *H. 8.* for three lives, rendering 3l. for the lands, 26s. 8d. for the tithes of corn, and 6s. 8d. for the small tithes; that afterwards the statute of 27 *H. 8. Rastall, Monasteries* 9. was made, whereby all monasteries not above the value of 200l. *per annum* were given to the king, by virtue whereof the reversion of these lands, the monastery being under the value of 200l. *per annum*, came to the king; and shewed that the lease continued till 20th of *Elizabeth* without the payment of any tithes; and then conveyed the rectory to the defendant, and the lands to himself (the plaintiff in the prohibition), and pleaded the statute of 27 *H. 8. c. 20.* whereby it is enacted, that the king and his assignees shall hold in as ample and large manner as the abbot held the land, and likewise pleaded the branch of the statute of 31 *H. 8. c. 13.* which discharges from the payment of tithes; and further stated, that he was ready to pay the rent that was paid to the abbot, &c. and concluded that the defendant *contra modum decimandi predictum et contra formam statutorum prædictorum* demands tithes, &c. To this declaration the defendant demurred, and prayed a consultation.

Wincoll of the *Middle Temple* argued, that the count is insufficient: 1st, in regard that the plaintiff entitles himself to be discharged of tithes by reason of a unity of possession; and it does not appear that there has been a perpetual unity time whereof, &c. for he saith, that there has been a unity from the time of the foundation of the abbey till the time of the dissolution, which is not sufficient without shewing that the foundation has been time whereof, &c. It might be, notwithstanding this plea, that the foundation was 10, 20, or 30 years before the dissolution, which would not be sufficient;

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cient; for if the time of the commencement of the foundation appeared, that would destroy the custom, according to the case of *Hunkins v. Hunkins*, where an immemorial unity of possession in an abbot of the rectory and lands whereof the tithes were demanded *simul et semel* being alleged, it was shewn by the defendant in prohibition that the foundation of the abbey was within 200 years; and thereupon it was ruled, that it was not a sufficient unity to discharge from payment of tithes: for the unity ought to be time whereof, &c. and where the commencement of a thing appears, it is not time whereof the memory of man runneth not to the contrary; for where any beginning appears either by record or other writing, it is not time whereof, &c. any more than if the beginning had appeared within the memory of man. And for that reason in 3 *H. 6.* 31. where one prescribed to have a road over land, and there was a unity of possession shewn of the land from which, &c. and of the land over which, &c. in the time of *Richard 2.* it was ruled, that the prescription was destroyed, inasmuch as there was a time shewn, when the road did not exist. 34 *H. 6.* 36. 19 *H. 6.* 75. 33 *H. 6.* 27. 34. 27 *H. 6.* *Prescription* 48, it is holden, that if a parson prescribes to have an annuity as appurtenant to his church, and the defendant shews either a deed by which the annuity was granted, or the time of the foundation of the church, the prescription is destroyed, because its beginning appears. 43 *E. 3.* 4. the defendant in an action of trespass made title to the plaintiff as a villein regardant of his manor time whereof, &c. to which the plaintiff replied, that his ancestor in the time of the defendant's great-grandfather, was an *adventif*; and it was ruled, that the prescription failed, because there was a time shewn when the plaintiff's ancestor was not a villein. And the New Book of Entries, 457. 2 *Co.* 47. the archbishop of *Canterbury's* case, P. 40 *Eliz. Rot.* 437. *Tr.* 34 *Eliz. Rot.* 83. and the case of *Ryder* and *Calmady*, accordingly, that a unity that will discharge one of the payment of tithes within the branch of the statute of 31 *H. 8.* ought to be a perpetual unity time whereof, &c. and if there be an allegation that it was time whereof, &c. where it is not so, it is a thing traversable, and an issue may be joined upon it. But it seemed to him that the general allegation that the land is discharged from the payment of tithes without shewing how it is discharged, is sufficient, according to 2 *Co.* 47, 48. inasmuch as it may be discharged many ways, as by composition, by prescription, &c. and it would be hard to drive him to shew how it is discharged, when there are so many ways which cannot

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cannot be well known; but, if he takes upon him to shew the special way how it is discharged, then it ought to be shewn exactly, otherwise the plea is insufficient, and a consultation shall be granted. And lands may be discharged from the payment of tithes without the aid of the branch of the statute of 31 H. 8. as where they are discharged by prescription under a spiritual person, as in the archbishop of *Canterbury's* case, or by composition, as, where there is a *modus decimandi* paid for the tithes in kind.

Coke, chief justice, *Croke*, *Dodderidge*, and *Houghton*, justices, thought that the count was insufficient, because it did not shew the foundation to be time whereof, &c. and the unity which will discharge one from the payment of tithes ought to be a perpetual unity, and not a temporary union.

2dly, *Wincoll* moved that the count was insufficient, because the plaintiff claimed to be discharged from the payment of tithes by the statute of 27 H. 8. c. 20. and the statute of 31 H. 8. c. 13. and neither of those statutes would discharge him. For the statute of 27 H. 8. will not discharge him, because it has not any words of discharge; for it only says, that the king's patentees shall have all such actions, suits, entries, and remedies, to all intents and purposes, as the abbots might or ought to have had, &c. which words will not make any discharge according to the resolution in *Green v. Balser's* case, where it was ruled that if the branch of the statute of 31 H. 8. had been only in general words, that the king and his assignees shall have the lands in as ample and large manner as the abbies had them, they would not operate any discharge, because such general words would never extend to a privilege of discharge. And the statute of 31 H. 8. c. 13. cannot discharge these lands, for that statute not being a statute by which monasteries were dissolved, but being only a statute by which monasteries dissolved by surrender, &c. since the 4th day of *February* in the 27th year of H. 8. were confirmed and settled in the king, his heirs and successors, it does not extend to discharge any lands from the payment of tithes, but those lands only which came to the king since the statute of 27 H. 8.; for, after reciting that the monasteries which have come to the king since the 4th day of *February*, it saith, that the said late monasteries and the lands appertaining to the said monasteries, &c. shall be retained and kept according to their estate and title discharged of the payment of tithes: wherefore as the abbey in the case at bar, and the lands appertaining to it, came to the king by the statute of 27 H. 8. they cannot be comprized within the statute of 31 H. 8. which extends only

only to lands which came to the king since the statute of 27 H. 8. So, for the like reason, lands which have come to the king since the statute of 31 H. 8. shall not be discharged from the payment of tithes, as we may see in 2 Co. 47. the archbishop of *Canterbury's* case, where it is ruled, that lands which came to the king by 1 E. 6. c. 14. shall not be discharged of tithes within the 31 H. 8. And 1 Ja. Rot. 45. and Hill. 44 Eliz. Rot. 444. *Quarles and Spurling's* case, where it was ruled, that lands parcel of the priory of St. *John of Jerusalem*, which came to the king by the statute of 32 H. 8. c. 24. shall not be discharged from the payment of tithes within the 31 H. 8. which extends only to those monasteries which came by inferior means than an act of parliament subsequent to the statute of 31 H. 8. For the same reason those lands which came to the king before the statute of 31 H. 8. shall not be discharged; the statute of 27 H. 8. being as high means as the statute of 31 H. 8. and not inferior to it.

3dly, He argued that the conclusion of the count was insufficient, which saith, and so *contra modum decimandi*, &c. the plaintiff ought not to pay tithes; whereas a *modus decimandi* will not discharge one from the payment of tithes, unless it has been time whereof, &c.

4thly, It appearing to the judges, that the tithes were leased for a rent, they granted a consultation; for now it is manifest that tithes were paid at the time of the dissolution; and if tithes were paid by the farmers of the land, then is the land not discharged from the payment of tithes within the branch of the statute of 31 H. 8. c. 13. and this payment of rent for the tithes was a payment upon the matter of tithes, and a seisin of them.

Note, It appears by the record that there was a demurrer upon the suggestion; but it does not appear that a consultation was granted.

M. 12 Ja. A. D. 1614. B. R.

Hickes v. Froud. [MSS. *Calthorpe.*]

THE parson of *North Somerset* libelled against *Hickes* for the tithes of the agistment of cattle. *Hickes*, upon a suggestion that there is a great waste between the vills of *South Somerset* and *North Somerset*, and that the residents and occupants of each vill have had common by reason of vicinage, and that there is a custom that if any inhabitant of the vill of *South Somerset* have any pasture ground in

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in the vill of *North Somerset*, for the of those cattle which go on the walle, that then he shall pay tithes to the parson of *South Somerset* where he inhabits; and that in consideration thereof the parson of *South Somerset* shall pay to the parson of *North Somerset* 4 s. and to the vicar 8 s. and so the party who inhabits within his parish shall be discharged of tithes against the parson of *North Somerset*, had a prohibition granted to him, and issue being joined upon the custom, it was found for the plaintiff. It was moved in arrest of judgement by serjeant *Bawtry* of *Lincoln's Inn*, that the custom was not good, because it was not equal. For it is not reasonable that the parson of *South Somerset* should have all the tithes of the lands of *North Somerset*, paying to the parson 4 s. *per annum*, and that the parson of *North Somerset* should not have the same privileges in the lands in *South Somerset*. And by law no parson is to have tithes but of lands in his own parish. *Sed non allocatur*, for though the custom is hard, yet it is found by the verdict, and therefore we cannot interfere; and here is a recompence, such as it is, given to the parson of *North Somerset*; and though it be not given by the parties themselves, yet it is given by the parson, which is all one, according to the case of *Heron v. Pigot*, in which it was adjudged, that a custom to pay the tithes to the lord of the manor, who used to pay an annual rent for the maintenance of the parson, was good.

Supra 200.

The case was afterwards moved again by Serjeant *Bawtry*, who said that a *modus decimandi* being the consideration in respect of which tithes due in kind are not to be paid as they ought of right to be, should be precisely alleged, so that it may appear to the court that the parson has a recompence in satisfaction of his tithes; that it is not so alleged in the present case; for the party who claims to be discharged of tithes does not pay any *modus decimandi* to the parson of *North Somerset*; but it is alleged, that the parson of *South Somerset* pays to the parson of *North Somerset* 4 s. in discharge, which is not sufficient. For where a parson would be discharged by a *modus decimandi*, he ought to pay the *modus* himself according to the rule, *qui sentit commodum, sentire debet et onus*; and therefore as in this case he does not pay it himself, but another pays it for him, it will not be sufficient to discharge him from the payment. *Sed non allocatur*, for by *Coke* chief justice, *Croke* and *Dodderidge* justices, the custom is good enough to discharge the occupier of lands in *North Somerset* from the payment of tithes to the parson of *North Somerset*, though

though he pays nothing himself for them to the parson; for he pays his tithes in specie of these lands to the parson of *South Somerset*, who pays 4 s. to the parson, and 8 s. to the vicar of *North Somerset*; and so the parson of *North Somerset* has a consideration, and the occupier has a discharge, though it be not between the parties themselves, according to the case of *Pigot v. Heron*, where it was ruled, that a custom to pay tithes to the lord of a manor, who for himself and his free tenants paid an annuity to the parson in discharge of them, was good, for there the free tenant is charged with the tithes to the lord of the manor, and therefore it is not reasonable that he should be charged with the tithes to the parson also, when he receives an annual pension from the lord to whom the payment of the tithes is made in consideration of the tithes. And in this special case a layman may have a portion of tithes, and sue for the subtraction of them. And by *Coke* chief justice, and *Dodderidge*, the custom in the case at bar will not aid any one, but only such person as both depastures his cattle in the waste, and also lands in *North Somerset*, for if he lands in *North Somerset* only, or, if he depastures cattle in the waste only, then the custom will not extend to him, because it is, that no tithes shall be paid to the parson of *North Somerset*, where the person is an inhabitant of *South Somerset*, and depastures cattle in the wastes, and also lands in *North Somerset*.

It was then moved by *Houghton J.* that no prohibition ought to have been granted in the case at bar, because the right to the tithes is to be discussed between two parsons, viz. the parson of *North Somerset*, and the parson of *South Somerset*; and it has been often adjudged, that if a parson libel against one of his parishioners for tithes, upon a suggestion that the parishioner ought to pay the tithes or a *modus* to the vicar, a prohibition shall not be granted, because the right comes to be discussed between two ecclesiastical persons. *Quod fuit concessum* by *Coke* chief justice, who said, that it appears by the book of 22 E. 4. that if in an action of trespass the right to tithes comes in question, this court shall be ousted of jurisdiction. And in the case of one *Bush* who was parson of *Paneris*, and of *lady Gresham*, who had the parsonage impropriate of it was ruled, that if the parson libel in the spiritual court against one for tithes, who pleads that he pays 10 s. in consideration of all manner of tithes to the vicar of the same parish; no prohibition in such case is to be granted; because the *modus decimandi* does not come in question; but the only point is, to whom the tithes of right belong, and that

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is triable in the spiritual court. But still he said there was a great difference between that case and the case at bar; for in the case at bar the tithes are payable against common right; because to pay the tithes to the parson of another parish than that in which the lands lie, is against common right, and by intendment it ought to begin by some grant made by the parson, patron, and ordinary of *North Somerset* to the parson of *South Somerset*, or otherwise by some grant made by the parishioners before the council of *Lateran*, and therefore a prohibition might well be granted upon the suggestion of such a custom. But, where the parson and vicar are both in the same vill and parish, there, the tithes are paid of common right, and no prohibition ought to be granted. And in the case of *Pigot v. Horn*, where the question was between the parson and the lord of the manor, to which of them the tithes of right belonged, a prohibition was granted; for that the payment of tithes to the lord of the manor is against common right. And *Coke* took it to be a rule, that wherever a spiritual thing begins by temporal means, there, if there be a suit for it in the spiritual court, a prohibition may be well granted; and therefore if tithes are granted by deed to the parson of another parish than that in which the lands lie, and a suit be instituted for them in the spiritual court, a prohibition may be granted according to the Register Judicial where may be found a superseas upon such a grant made by the prior of *Lewes*. And if an obligation or other specialty be made for marriage money, a prohibition shall be granted if there be a suit for it in the spiritual court; for the specialty alters the nature of it.

M. 12 Ja. A. D. 1614. B. R.

Russell v. Patridge. [MSS. Calthorpe.]

a Bullfr.
285. S. C.
by the name
of Russell v.
Backhurst.
Qu. Whether
the Weald of
Kent be ex-
empted
from paying
tithe of
underwood.

RUSSELL libelled in the spiritual court against *Patridge*, for the tithes of *silva cadua*. *Patridge* suggested that the place where the underwood of which the tithes are demanded is situated, is in the *Weald of Kent*, which contains 14 parishes, and that it was formerly all woody ground, and is now converted into arable and pasture land; and that there hath been a custom there time whereof, &c. that no one shall pay any tithe of wood; and upon this suggestion he prayed a prohibition. And *Hendon* argued that a prohibition might well be granted; for it seemed to him, that as an entire country may prescribe in *non decimanda* for any particular thing;

thing; so may a particular place prescribe in *non decimando*; and that an entire country may so prescribe appears from the last chapter of the *Doctor and Student*. In the next place the very statute of 2 & 3 E. 6. c. 13. discharges the *Weald of Kent* from the payment of tithes of wood: for the statute saith, that all predial tithes shall be paid in such manner and form as they have been of right yielded and paid within forty years next before the making of that act; and there were no tithes paid at all of wood, as appears by the alleged custom; therefore it shall be now discharged from the payment of tithes. 3dly, The parson has now a greater benefit than he hath had in time past; for at this day the *Weald of Kent* is converted into arable and pasture land, so that now the parson hath the tithe of corn and hay, which he never had before; and therefore it is reasonable that as there were no tithes paid of wood when there was a very trifling advantage to the parson, there should be none paid now of it when he has a great advantage. And in the common pleas, between *Downton v. Sir Moyle Finch*, in an action of debt upon the statute of 2 & 3 E. 6. it was holden, that no tithes ought to be paid of wood, and that the custom *de non decimando* was good.

But *Coke* chief justice, and *Dodderidge*, seemed to incline to think that a prohibition ought not to be granted, unless some ancient instrument in writing or matter of record could be produced, which should shew the foundation of the prescription in *non decimando*: for it seemed to them that the prescription by a country in *non decimando* was in respect of some composition. And *Coke* said that both the *Doctor and Student* and *Lindwood* agreed, that a whole country may prescribe in a *non decimando* where there is a sufficient maintenance for the parson over and above the tithes. But this does not appear to be a whole country, nor do its contents appear to us, so that it may be greater or less for aught that we know; but there is only a suggestion made to which we are not bound to give credit. And as to the clause of the 2 & 3 E. 6. which was urged, they said, that, in the first place, the clause goes beyond what has been recited; for it not only says that tithes shall be paid in such manner as they have been paid by the space of forty years before; but it says also, "or of right or custom ought to be paid:" and tithes of underwood of right ought to be paid. It is possible too that there was not in this part any other wood but only great timber, which was never to pay tithe; and it would be hard that now, when there is underwood, no tithes should be paid of that, because there were not any tithes paid for

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for it for forty years before the making of the statute. And if the statute be properly observed, it will afford a strong argument that tithes ought to be paid, notwithstanding they were not paid by the space of forty years: for it has a clause which enacts that no tithes shall be paid of barren or heath ground for the space of seven years after its manurance; the inference from which is, that if this clause had not been introduced, the tithes of it must have been paid immediately after the manurance; and yet of such lands, so being barren, no tithes could have been paid by the space of forty years next before the making of the act. And here *Coke* said, that *Kent* was conquered by *William* the Conqueror, though it might be that the conquest was made by a composition, and not by a conquest in battle. And he also said, that it was a great misery to the commonwealth to have the wood so consumed, as it is by the iron forges and glass-houses; since our ships are the walls of our realm.

M. 12 Ja. A.D. 1614. B.R.

Cotes and Suckerman v. Warner. [MSS. Calthorpe.]

1 Ro. Rep.
53, 252.
2 Buller.
248. S. C.

SIR *Henry Warner* libelled in the spiritual court against *Cotes* and *Suckerman* for the tithes of hay growing within the parish of *Milnall*. *Cotes* and *Suckerman* upon a suggestion, that the abbot of *St. Edmundsbury* in *Suffolk* was seised of the manor of *Milnall* in his demesne as of fee in right of his abbey, (of which manor the closes where the hay was made were parcel), and that he and his predecessors time whereof, &c. had those closes exonerated and discharged from the payment of tithes for himself, his tenants, farmers and occupiers, and that they so continued until the time of the dissolution, at which time the abbey and all the lands thereto belonging were given to king *H. 8.* and from him they descended to king *E. 6.* and from king *E. 6.* to queen *Mary*, and from queen *Mary* to queen *Elizabeth*, and from queen *Elizabeth* to the now king, who granted the manor of *Milnall* by his letters patent to sir *Harry Warner*, &c. and that they (the plaintiffs) were occupiers of the said closes, and therefore ought to be discharged from the payment of tithes by the statutes of 31 *H. 8. c. 13.* and 2 *E. 6. c.* obtained a prohibition. To which the defendant pleaded, that the abbot was seised of the manor of *Milnall*, &c. and that the closes of which the hay was demanded were parcel, &c. and that the king had granted the manor to him, &c. as in the count alleged: but he farther

farther said, that *Cotes* and *Suckerman* were severally seised of an ancient house and two acres of land; and that they time whereof, &c. have used to have *libertatem fulcandi* for fodder for their cattle which were levant and couchant upon the closes as appurtenant to their houses and lands; and that they cut the hay, and he, for the non-payment of the tithes, upon request, libelled against them in court christian; *absque hoc* that they were tenants, farmers, and occupiers of the said closes. To this plea *Cotes* and *Suckerman* severally replied, and confessed that they had the houses and lands aforesaid, and further shewed, that they used to put in their cattle into the said closes; and that in 31 *Eliz.* they put in their cattle, and mowed the grass, and carried it away, *per quod* they were the occupiers of the closes. To this replication the defendant demurred. And *George Croke* argued that the replication was insufficient, the *per quod*, which is the conclusion, not being maintainable by the premises; for the statement in the premises, that the plaintiffs had a power of putting in their cattle, and mowing the grass, and carrying away the hay, does not prove them to be occupiers; for that they might well do, and yet not be the occupiers; as, if they enter upon sir *Henry Warner*, and put in their cattle, &c. in that case they do what is alleged in the premises, and yet they are not occupiers. The conclusion then not being maintained by the premises, the replication is insufficient; for that which comes in in the *per quod* is not traversable, nor can it make an issue. And of that opinion was *Coke* C. J. *Dodderidge* and *Houghton* justices. But then *Goldsmith* insisted, that the replication was well enough, for that it met the defendant's plea, and the conclusion of the replication is an affirmative to the defendant's negative alleged in his bar, and therefore it makes a good issue according to the case in 7 *E. 4.* where in debt brought against executors they pleaded a recovery had against them by *J. S.* beyond which they had no assets; to which the plaintiff replied, that there was not any debt due to *J. S.* and so the recovery was void; and this conclusion was holden to be good enough. *Goldsmith* next insisted, that the plea in bar was insufficient, 1. because the defendant by his own traverse had traversed that which was the title by which he must sue in the spiritual court; for he had taken a traverse *absque hoc* that the plaintiffs were the farmers and occupiers of the aforesaid closes; and if they were not so, then they ought not to pay tithes, and if so, then there was no ground for the suit in the spiritual court: 2dly, because the traverse is repugnant to what the defendant has alleged in his

1614. plea; for in the beginning of his plea he has confessed that the plaintiffs have *libertatem falcandi*, (which makes them occupiers within the prescription), and yet he has taken a traverse *absque hoc* that they were occupiers. This being so, the bar is insufficient, and therefore judgement must be given for the plaintiffs, however defective the replication may be. For the court are to judge upon the whole matter together, and judgement must be given against those in whom the first fault in pleading is found, according to the case of *Hart and Smith*, 33 & 34 *Eliz.* where the plea in bar to the avowry being ill, the court gave judgement for the avowant, notwithstanding the replication was insufficient; and in *Poulters' case*, 4 *Co.* 82, 83. we find that the plaintiff had judgement upon an ill bar, notwithstanding his replication was insufficient; and in 7 *E.* 4. 3. it appears, that the court would not give judgement for the plaintiff where one of the defendants was found guilty, because it was apparent to them upon the whole matter, that the plaintiff had no title to the goods in question, and therefore no cause to have judgement.

George Croke e contra. He admitted that if the bar were insufficient, judgement ought to be given for the plaintiffs, notwithstanding their replication were insufficient; but he said that the bar was sufficient: for the defendant does not libel against the plaintiffs in prohibition as farmers and occupiers of the closes; but he libels against them as commoners, who have *libertatem falcandi gramen* for the maintenance of their tillage; which being so, the traverse neither crosses the ground of his suit in the spiritual court, nor is it repugnant to what he has before alleged in his plea: for commoners, who have *libertatem falcandi*, are neither farmers nor occupiers. And to that opinion the court assented; for they said, that those who cut the grafs ought to pay the tithes, be they disseisors, commoners, purchasers, or by whatsoever other title they take it; for tithes are to be paid out of the profits renewing and growing upon the land, and it is immaterial whether the persons who take them are farmers, tenants, or occupiers. And *Cole C. J.* and *Houghton J.* seemed to incline that those who had *libertatem falcandi* for the maintenance of their tillage were not within the prescription; for they are neither tenants, nor farmers, nor occupiers; and a prescription which goes to bar the church of the tithes which are due to it, is to be taken strictly. But they seemed to think, that if it had appeared upon the record that they were tenants to the lord of the manor of *Milnall*, then they would have

have been discharged within the prescription.—It was admitted in this case, that where a libel in the spiritual court is against two several persons for tithes, they may join in a prohibition, because the libel is joint against them, though they be several tenants.—*Coke C. J.* said, that a consultation shall never be granted, notwithstanding the insufficiency of the replication, if it appear to the court upon the whole matter that no tithes ought to be paid.

1614.

M. 12 Ja. A. D. 1614. B. R.

Cowper v. Andrews. [Moore 683.]

OKENDEN *Cowper* brings a prohibition against *Roger Andrews*, vicar of *Cowfield*, that whereas *Thomas lord de la Ware* was heretofore seised in fee of an 140 acres of land in *Cowfield*, late parcel of an ancient park called *Ewhurst* park, lately impaled and replenished with deer, and being so seised he and all those whose estate he had in the same 140 acres, and all the farmers and occupiers thereof have used time out of mind to pay the vicar of *Cowfield* for the time being two shillings a year, and one shoulder of every third deer that within the same park should be killed, in full satisfaction of all tithes renewing upon the same 140 acres, which the vicars have always accepted in discharge of all tithes; and then deduceth down the 140 acres to himself; and then shews, that though he tendered the two shillings by the year in such years, and though in the same there were no deer killed, yet the defendant refused to receive the same two shillings before-mentioned to be tendered, and sues him for tithes in kind for those years.

Qu. Whether a *modus decimandi* for a park, viz. 2s. a year, and a shoulder of every third deer killed in it, be determined by disparking. —The pleadings in this case may be found at length in *Winch's Entries* 608; but this statement of them is taken from *Hobart* 39, prefixed to his report of his own

elaborate argument. There is a loose and mutilated report of his lordship's argument, and that of *Mr. J. Warburton*, in 1 Ro. Rep. 120. and the arguments of the counsel may be found in *Godb.* 237.

The defendant by protestation denying the prescription, for plea saith, that the park, long before the time of the subtraction of the tithes aforesaid, was disparked, and the deer in the same were utterly destroyed and killed by the occupiers and possessors of the said park, and all the lands lying within the said park were converted into arable land and pasture, and so remain; and because the plaintiff after the disparking of the park would not pay tithes for the cattle and corn, &c. therefore he sued him. Whereupon the plaintiff demurred in law.

And whether a consultation should be granted, the court were divided in opinion; *Nichols* and *Habart* being against a consultation;

1614.

Winch and *Warburton* for one. *Hobart C. J.* said, that the two shillings is clearly a *modus decimandi* which is certain and annual, and the disparking does not prevent the payment of it: and the shoulders are casual, for if the owner does not kill a deer, or but two in a year, the vicar will not have a shoulder. And *Nichols* said, that where the owner converts tillage into pasture, the parson will lose his tithes of corn; and where the owner disparks his park, the parson will lose the shoulders; but he will have the two shillings, and he shall recover in the spiritual court a recompence in money for the shoulders; but the whole park is bound by the *modus decimandi*, and the vicar shall not have tithes in kind.

It seemed to *Winch* and *Warburton*, that by the disparking the prescription as to the shoulders was determined, and consequently, the whole *modus decimandi*, and then the vicar shall have tithes in kind; and if the park be revived, the prescription and *modus decimandi* will be also revived, as tenure by castle ward, &c.

M. 12 Ja. A. D. 1614.

Moyle v. Ewer. [Cro. Ja. 361.]

If a man
buy corn
standing of
the parson
himself, yet
shall he pay
tithes.

IN debt upon the statute 2 Ed. 6. the plaintiff demands 165 l. for that whereas by the statute made 2 Ed. 6. it is provided, &c. (reciting the clause in the statute concerning the setting forth of tithes, &c.) And whereas the plaintiff 30 Septemb. 6 Jac. was proprietor of the rectory of *Caverfield*, and of all tithes within the said parish; and whereas the defendant 1 Septemb. 5 Jac. was possessed for divers years to come of 300 acres of land within the said parish, whereof 130 acres were sown with wheat, 120 acres were sown with barley, 40 acres with peas, and 10 with oats; and whereas all tithes were usually paid in *specie* for those lands for 40 years before the said statute; and whereas the defendant the said 30 Septemb. 6 Jac. *sic inde possessionatus existens*, all the grain *ad hoc crescent*. upon the said lands did mow and cut down, and all the grain *inde provenient*. *apud Caverfield* did take and carry away, without setting forth the tithes, and without agreement with the plaintiff then being proprietor of the said rectory: *et dicit in facto*, that the tithe of the corn in the year of 6 Jac. so taken and carried away, was then worth 55 l. and the treble value was 165 l. *per quod actio accrevit* to the plaintiff to demand the 165 l. *aforsaid*: notwithstanding the defendant had not paid unto him the said 165 l. *Et actio producit*

producit factum. The defendant *protestando* that it is not of such value, for the plea saith, that the plaintiff himself sowed that corn, being possessed of the said land for divers years yet to come; and 5 Junij 6 Jac. sold the corn to the defendant; wherefore he took it; and traverseth that he was possessed from the time, &c. And it was thereupon demurred, and adjudged for the plaintiff, that he should recover 165 l. as he had declared. And now a writ of error was brought, and the errors assigned were, that the declaration was not good: First, because all the matter of the declaration and the offence is by way of recital; and the offence is not alleged by matter in fact, that he carried away the corn, and that the tithes were not set forth. *Sed non allocatur*; for it is sufficiently alleged as well as if it had been by express charge, and the action is brought for non-payment of the treble value, and the other is but to shew the cause how it became due. Secondly, because the plaintiff misrecites the statute; for whereas the words of the statute are, that he ought to agree with the parson, vicar, or other owner, proprietor or farmer of the said tithes, &c. the words of the declaration are, *cum rectore, vicario, aut alio proprietario seu firmario*, omitting the word (owner). *Sed non allocatur*; for owner and proprietor are all one and *synonyma*, and of the same sense, and the omission of that word is not material. Thirdly, for that he saith, that he was proprietor, but he doth not shew how, nor any title. *Sed non allocatur*; for it is but a conveyance to the action. Fourthly, because it is not shewn by whom the corn was sown. *Sed non allocatur*; for *non refert* by whom it was sown, the defendant being owner at the time of the reaping; and although the declaration be, that 1 Septemb. 5 Jac. he was possessed of lands sown with corn, and that 30 Septemb. 6 Jac. he thereof being so possessed, mowed and cut down, which being a year and month after, cannot be well intended; yet being possible, the declaration is good enough. Fifthly, for that there is not any time alleged of the caption or asportation. But the court conceived, the declaration being, that he, 30 Septemb. 6 Jac. *sic inde possessionatus* of the said land, *messuit granum prædictum*, it is to be intended, that he reaped it the same day; and the declaration being, *ac totum granum inde provenient. cepit et asportavit*, although he doth not say, *adunc ibidem*, yet it is coupled with the former time by the word (*ac*) and hath reference to the former time. And they said, that if any one will buy corn standing of the proprietor of a rectory, if he hath not special words to discharge it, he ought to pay tithes; and the carrying away of such corn without setting out the tithes,

Exceptions to a declaration upon 2 & 3 E. 6.
1. That the offence was alleged only by way of recital.

2. That the word *owner* was omitted.

3. That it was not shewn how proprietor.

4. That it was not shewn by whom the corn was sown.

5. That the time when the corn was taken away, was not stated; all disallowed.

1614. is an offence within the statute. Wherefore the judgement was affirmed, that he should recover the treble value, as he had declared.

P. 13 Ja. A. D. 1615. B. R.

Owen v. The Parishioners of All Saints in Northampton.
[MSS. Calthorpe.]

Whether a church be impropriate or not, is to be tried at common law.

A CHURCH being appropriated, and having continued so for the space of sixty years without any presentation at all having been made to it; one *Owen*, pretending that it was a presentative church, and that it was devolved to the king by lapse, obtained a presentation under the king's letters patent, and was admitted to it, instituted, and inducted; and this being the church of *All Saints* in the town of *Northampton*, and belonging to one *Carye*, as commisee of the wardship of one *Alice Crompton*, to whom it descended as a church appropriate, *Owen* libelled against the parishioners for the tithes. In answer to which they alleged, that the church is a church appropriate, and that *Catlin* is vicar of it, and that they pay the tithes to the owner of the impropriation. But, notwithstanding this allegation the spiritual court proceeded in the suit under a pretence that the impropriation was determined. And *Croke* serjeant moved for a prohibition, because an impropriation is now become a lay-fee, and therefore it belongs to the common law to try whether it be an impropriation or not. And *Coke* chief justice, *ex officio* *Croke*, *Dodderidge*, and *Haughton*, justices, was of opinion, that a prohibition should be granted; for whether a church be appropriated or not, is a thing triable at common law: for an appropriation by reason of the interest which the king hath to present by reason of lapse, or of the minority of the heir of his tenant, cannot be made without the king's assent under his letters patent, as may be seen by 5 E. 3. & 12 E. 3. And where the spiritual law is mixed with the temporal law, there, the temporal law shall always have the jurisdiction, as being the elder sister. Besides it would be a mischievous thing that the spiritual law should try the validity of an appropriation where it has been given to the king by an act of parliament, and by the king to one of his subjects under his letters patent, and so has come by mesne conveyances to several other persons; for that would be to try the inheritances of men, which it does not belong to the spiritual law to do, but only to the common law. Indeed, the trial of a union and consolidation

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tion belongs to the spiritual law, because it is made by the ordinary without the assent of the patron or king. And *Coke* chief justice said, that a reputative appropriation is given to the king by the statute of 31 H. 8. c. 13. though it may not be an appropriation within the strict rules of law: and for that reason he had known it decreed in chancery upon the opinion of the justices, that where an appropriation was made with the assent of the king, the patron, and the ordinary, it should be given to the king, notwithstanding the patron who assented was only tenant in tail, and so his assent was determined upon his death, and therefore it was an appropriation in reputation merely, and not in fact, at the time of the making of the act. It hath also been lately adjudged in the common pleas, that notwithstanding a vicar was not endowed according to the statutes of 15 R. 2. & 4 H. 4. and therefore the appropriation was void by those statutes, yet such appropriation being an appropriation in reputation, was given to the king by the above statutes, and could not be avoided for this defect. And *Dodderidge* justice said, that there are few appropriations in *England* which have all the ceremonies required by the law to the making of an appropriation.

12 Rep. 4 b.
infra notes.

This case was afterwards moved again by *Harris* serjeant, who prayed that the prohibition might be dissolved, because it appeared that there had been four presentations made in the time of queen *Elizabeth*, and that the profits consist merely in oblations, for which there was no remedy any where but in the spiritual court. But *Dodderidge*, *Croke*, and *Houghton*, justices, would not dissolve the prohibition, because the patronage was a lay inheritance, and the impropriation was now made a lay-fue, so that it was triable at common law: and the prohibition being founded upon the appropriation, it might be properly tried whether it be an appropriation or not; and it would be the speediest course to try it at the common law. And *Dodderidge* said, that an action of debt on the statute of 2 & 3 E. 6. does not lie for the subtraction of oblations.

Tr. 13 Ja. A. D. 1615. C. B.

Wilson v. The Bishop of *Carlisle*. [Hob. 107.]

THOMAS *Wilson* brought a prohibition against *Henry* bishop of *Carlisle*, and laid, that there was within the parish of *Greystock* this custom for tithing wool amongst others, that if any inhabitant

Custom of
tithing w-
thout view of
the patron
is bad.

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have five fleeces of wool or above, that then such inhabitant, after shearing and binding up the said five fleeces *absque fraude et dolo fideliter solvet rectori post monitionem, &c. apud ostium domus mansionalis ejusdem inhabitantis infra parochiam prædictam decimam partem inde absque aliquibus visu vel tactu novem partium ejusdem lanae residua per rectorem, &c. habendum vel scrutandum in plenam, &c.* and that the parsons, &c. have so accepted it; and then laid, that the bishop of Carlisle pretending himself parson or commendatory, &c. The bishop pleads himself the parson or commendatory of the church by presentation, &c. from the countess of Arundel, and yet shews that his faculty and confirmation was so long as he should remain bishop of Carlisle, (which may well stand together, that he may be parson absolute, yet qualified by his faculty to hold it but for a time), and then to this custom demurred in law. And it was this term adjudged for the bishop with one consent; for the substance of the prescription is laid that the very true tenth is and ought to be paid without fraud, which is not prescriptible, for it is common right; then the sole point prescriptible is, that this is without view or touch of the nine parts, which is in effect repugnant to the other; for when you have laid truth in the former part, you lay the way to fraud in the latter; for it is against common reason that any man judge or divide for himself, and then take choice of his own division; against the rule of partition in *Litt.* For the truth of the tenth depends upon the proportion it holds with the nine parts; and therefore for the parishioner, who is in the nature of an adversary to the parson in this case, to set out a part for the tenth, which he only affirms to be just, is to give him merely power to tithe as he lists, and the prescription were as reasonable as to say plainly, that he might set out what tithe he list.

A. E. 6. 6. the guardian that tenders a marriage, must present the person to the ward. And it is a weak answer to say, that if it be not a just tenth he may refuse it and sue for his due. For first, he hath no means to be assured whether it be true or not; so his suit may be causeless, sure he may be, it will be fruitless: but the law was provided not directly to ingender, but to prevent suits, and therefore provides, that things be done by indifferent means and persons, that there be no just suspicion of indirect dealing.

If a man were judge in his own case and judged amiss, a writ of error would redress it; so if a bishop disturb, or would not admit the clerk, he might be compelled; yet the law provides better, that is, that you have your right, and therefore that your means be

be such as is likely to produce it, you may challenge the array or the polls; yet, you shall remove the *venire fac.* to another officer, as the coroner, where the sheriff is suspected in law, by a provisional challenge afore to avoid delay, which is a kind of injury.

1615.

M. 13 Ja. A. D. 1615. C. B.

The Serjeant's Case. [MSS. Calthorpe.]

THE serjeant's case appeared upon the pleading, as I conceive, to be as follows: *Alexander Nowell* dean, and the chapter of *Paul's* being seised of a rectory, make a feoffment in fee by deed in 17 *Eliz.* to *Philpot* and his heirs to the use and behoof of the queen, her heirs and successors; after which a fine is levied, and then the statute of 18 *Eliz.* is made. *Alexander Nowell* dies; *Dr. Overell* is elected dean; five years pass; the queen grants the rectory to *H. D.* and his heirs; *Dr. Overell* the dean, and the chapter of *Paul's* execute a letter of attorney to make an entry in their names to their use, and an entry is made accordingly; after which they grant a lease of it for three lives to *Bolton*. *H. D.* sows certain land, parcel of the possessions of the prior of *St. John's of Jerusalem* in *England* with corn, and after the corn is severed carries it away, upon which *Bolton* brings an action of debt upon the statute of 2 & 3 *E. 6.*

Whether the lands belonging to the hospital of *St. John's of Jerusalem* be discharged of the payment of tithes.

It seemed to *Finch* serjeant, that judgement ought to be given for the defendant. And he said, that here was but one case, and but one question, for the case was but one, as it had been found by the special verdict; and the question is but one, namely, whether the action lies or not. Yet this case, though it be but one, concerns both the temporal and ecclesiastical state of the realm; for it concerns the queen, who is the supreme head both of temporal and ecclesiastical persons; it concerns deans and chapters, who are a secular corporation; and it concerns priors, who are regular and religious. It is founded on the four principal standards of the law: for it is founded upon a feoffment which is a conveyance of the law for all possessions; upon a fine, which is the general assurance of the realm; upon a trust and confidence which has diffused itself into the estates of every one; and upon tithes, which are the flower of spiritual possessions; so that though the general question be but one; yet it divides itself into three general questions; the first of which is founded upon a feoffment; the second is founded upon a fine; and the third is founded upon tithes. And in the discussion of

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of these questions there are five statutes which are to be taken into consideration. The first is the statute of 13 *Eliz. c. 10.* the 2d is the statute of 18 *Eliz. c. 11.*; the 3d is the statute of 4 *H. 7. c. 4.*; the 4th is the statute of 31 *H. 8. c. 13.*; the 5th is the statute of 32 *H. 8. c. 24.* As to the first question, that subdivides itself into three parts; the first of which is, whether the queen be restrained by the statute of 13 *Eliz. c. 10.* so that she cannot take any thing from a dean and chapter, they being persons disabled by that statute from making any alienation of their possessions: the 2d is, whether the feoffment made to *Philpot* be merely void, so that upon the words of the statute of 13 *Eliz. c. 10.* it shall be void to all intents and purposes, void against the dean himself who made it: the 3d is, whether the feoffment be made good by the statute of 18 *Eliz. c. 11.* or not. As to the second general question, it subdivides itself into two parts: the first is, whether the fine and five years suffered to pass by the dean be a perpetual bar to the successors or not: the second is, whether, since the dean's predecessor suffered the five years to pass, he himself and his chapter can enter or not. As to the 3d general question, that also subdivides itself into two parts; the first of which is, whether the possessions of the prior of *St. John's of Jerusalem* shall be said to come to the king by the statute of 31 *H. 8. c. 13.* so that they shall be discharged of tithes by that statute: the second is, admitting that they come to the king by the statute of 32 *H. 8. c. 24.* if they shall now be discharged of tithes by the statute of 31 *H. 8. c. 13.* made before it.

[*Note. All the topicks of argument, except those on the subject of tithes, are omitted.*]

As to the first part of the third question, it seems to me, he said, that the possessions of the prior of *St. John's of Jerusalem* are not vested in the king by the statute of 31 *H. 8.* 1st, In regard that the statute of 31 *H. 8.* does not dissolve any monastery, nor give anything to the king according to the 1 & 2 *Mar. Dy. 3.*; and therefore these possessions could not be vested in the king by that statute. 2dly, It appears by the special verdict that the land is vested in the king by the 32 *H. 8.* If then it is vested in the king by the 32 *H. 8.* it cannot be said to be vested by the 31 *H. 8.* for as a child cannot have two fathers and mothers, so land cannot be given to the king by two acts of parliament; for it is of necessity that one of them must give it, and not both. As to the 2d part, it seemed to him, that notwithstanding the possessions of *St. John of Jerusalem*

are vested in the king by the statute of 32 H. 8. c. 24. yet they are not to be discharged of tithes by the general words of that statute, which wills, that *the king shall have all liberties, franchises, privileges, parsonages, tithes, &c. which appertained or belonged to the said religion, &c.* For the privilege of being discharged of tithes being a mere personal privilege shall never be transferred to another by the general words of an act of parliament; but, upon the dissolution of the corporation, there shall be also a dissolution of the privilege, according to the case of 7 E. 4. 22. where it is holden, that by a determination of the office there shall also be a determination of the fee which belongs to the office, because it is a thing incident to the office. And 35 H. 6. 56. upon the dissolution of the *Templars*, there was also a dissolution of the appropriations; and the personal privilege to hold in frankalmoigne could not be transferred by the general words of the 17 of E. 2. And it is resolved in the archbishop of *Canterbury's* case in 2 Co. that the general words of 2 & 3 E. 6. do not give any immunity to be discharged of tithes. The same law as to the statute of 37 H. 8. And the very words of the statute of 32 H. 8. shew, that the privilege of being discharged of tithes appertains to the order of religion, and therefore the order being dissolved, the privilege is also dissolved; and though the words of this statute be, *which appertained to the religion*, yet that is to be intended of the order of religion, for otherwise the king could not have any of their lands, but they would revert to the founders, according to 5 H. 7. 37. and 7 E. 4. by *Danby*. But, notwithstanding they are not to be discharged by the general words of the 32 H. 8. yet they shall be discharged of the payment of tithes by the statute of 31 H. 8. c. 13. For in that statute there is a double provision and ordinance made for religious houses, in two distinct branches; the first of which is, that *all religious and ecclesiastical houses, &c. which hereafter shall happen to be dissolved, suppressed, renounced, &c. shall be vested, deemed, and adjudged by authority of this present parliament, in the very actual and real seisin and possession of the king our sovereign lord, &c.* The 2d is, that the king and his patentees, *which have or hereafter shall have any monasteries, &c. shall have, hold, retain, keep, and enjoy, the said monasteries, &c. discharged and acquitted of payment of tithes, as freely, and in as large and ample manner, as the said late abbies, &c. had them.* And here the king had and enjoyed these lands parcel of the possessions of *St. John, &c.* wherefore by the words of the statute they shall be discharged. Besides, the words *dissolved, suppressed, renounced, and relinquished,*

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relinquished, being of one nature; and the words, *forfeited, given up, or come*, being of another nature, are to be observed. For where corporations are dissolved, there, if no other provision be made, the founder shall have their lands: but, if the lands are relinquished, there, neither the king nor the founder shall have them, but they remain as in the corporation: but by way of forfeiture or giving up, as in the case at bar, they may well enough come and settle in the king, and the king shall have the benefit according to the provision of the statute. And as to what has been objected, that where lands come to the king by an act of parliament, that shall not be said to be such a coming to the lands as is intended by the statute, in the first place he said, that that might be well enough said to be a coming within the statute; and so was the opinion of *Pepham* chief justice. In the next place, the king does not come to them by the act of parliament; for an act of parliament cannot be a donor, as may be seen by *Wimbish's* case in *Plowden*; and therefore the prior and convent who surrendered them shall be said to be the donors, and it shall be said to be a *giving up* by them, which may well enough be comprized within the statute. And as to the objection which has been made, that a thing shall never be within the branches, which is not in the root, and that because the possessions of the priory of *St. John's of Jerusalem* are given by the act of 32 H. 8. c. 24. and not by the act of 31 H. 8. c. 13. they shall therefore not be capable of being discharged of tithes by a branch of the statute of 31 H. 8.; he said, first, that a thing which is not within the root may well be within a branch; as, where lands devisable holden *in capite* are devised, the king shall have the wardship and primer seisin of a third part by virtue of a saving in the statute of 32 H. 8. notwithstanding the lands being devisable by custom are not contained within the body of the act, as appears from a case in 4 & 5 Mar. Dy. 155. and *Matthew Mene's* case, 9 Rep. 133. & Hil. 1 Eliz. Rot. 573. in the king's bench. In the New Book of Entries 454. there is a strong case to our purpose; and if the pleading there be good, as it is admitted, it over-rules the case in question; for the pleading is *virtute actus*, 32 H. 8. c. *et vigore actus parliamenti facti*, 31 H. 8. the king was seised; and it shall not be that he was seised by virtue of the statute of 31 H. 8. except in case where he is to be discharged of tithes. And here he cited *Granvill's* case 31 El. where it was adjudged that a bishop is not within the statute of West. 2. c. 41. for the words of the statute do not extend to him, they being express of certain persons within the compass of which
a bishop

a bishop cannot be ; for a bishop is a secular, and not a religious person. And he cited the opinion of *Manwood* to be, that by a grant of a monastery in the case of the king, any religious house, be it an hospital or any other, will pass.

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Chamberlayne serjeant argued for the plaintiff, but I have omitted the report of his argument, because I heard only a part of it ; and because the substance of it may be seen in my other book of Reports in the case of *Urry and Bowyer, supra*.

M. 14 Ja. A. D. 1616. B. R.

Anon. [MSS. Calthorpe.]

A PROHIBITION was granted to a suit in the spiritual court for the tithes of a house in *London* ; because, by the statute of 37 H. 8. c. 12. the mayor has jurisdiction given him to make order concerning the payment of tithes in *London*.

P. 15 Ja. A. D. 1617. B. R.

—— v. *Barnes*. [MSS. Calthorpe.]

farmer of the rectory of *Trumpeton* libelled in the spiritual court against *Barnes* for the tithes of five acres of grafs : the defendant set forth a custom by which he was to pay the 10th cock in grafs, after it is cut down and cocked, and before it is made into hay ; to which the plaintiff replied, that if the ground be wet, he is to take the 10th cock in grafs before it be made into hay ; but if the ground be dry, then he is to have the 10th cock, after it is made into hay : and sentence was given in the spiritual court against the defendant, and he was adjudged to pay 7 d. because he had paid neither tithe grafs nor tithe hay, and 20 marks. A prohibition was moved for, because the issue was joined upon a *modus decimandi*, which was a thing triable at common law. And it was agreed, that where the issue is upon a custom which gives a recompence for the tithes in kind, there, a prohibition ought to be granted : but, where the custom alleged gives no recompence, a prohibition ought not to be granted ; and therefore in this case the prohibition was refused.

Where the issue in the spiritual court is upon a custom which gives no recompence to the parson for the tithes, a prohibition shall not be granted.

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Tr. 15 Ja. A. D. 1617. B. R.

Portinger v. Johnson. [MSS. Calthorpe.]

PORTINGER sued *Johnson* in the spiritual court for the tithes of grafs to be made into full, sufficient and perfect hay. *Johnson* surmised that there was a custom to cut the grafs, and then to ted it, and to put it into grafs cocks, and that when it is in that state the parson is to take his tithe : and upon this surmise a prohibition was moved for : and the cases of *Aubrey v. Johnson*, in 34 *Eliz.* in *B. R.* and *Portinger v. Johnson* in 41 *Eliz.* where upon the like surmise a prohibition was granted, were cited. A day was given to shew cause, and I was of counsel in the case, but the prohibition was denied ; for it being confessed, that tithes ought to be paid, and the *modus* giving no manner of recompence to the parson, it is not to be resembled to a *modus* which gives a recompence, for this *modus* may well enough be tried in the spiritual court, and accordingly in the case of farmer of the rectory of *Trumpeton* and *Barni*, a prohibition was denied for this very reason. And *Johnson* was parson of the church of *Barfield* in *Berkshire*.

Supra 285.

Tr. 15 Ja. A. D. 1617. B. R.

Anon. [MSS. Calthorpe.]

A mill newly erected upon glebe land is tithable. The extent of an endowment is triable in the spiritual court.

A MILL is erected upon glebe land parcel of a parsonage which came to the king by the statute of dissolutions. The vicar, who is endowed with small tithes, sues the parson for the tithes of the mill. The parson applies for a prohibition, 1st, because the glebe upon which the mill is erected was discharged of the payment of tithes : 2^d, because the vicar's endowment does not extend to the tithes of a mill. But the prohibition was denied ; for the mill being lately erected, tithes ought to be paid for it, and the extent of the endowment is a matter triable in the spiritual court. The discharge of the glebe cannot extend to a mill erected *de novo*.

Tr. 15 Ja. A. D. 1617. B. R.

Dobitost v. Curteens. [MSS. Calthorpe.]

UPON a special verdict in an action of debt upon the statute of 2 & 3 E. 6. the case appeared to be as follows: *William Fleming* abbot of *Evesham* and his predecessors being seised time whereof, &c. of a parsonage and rectory appropriate, and of a certain grange within it, in the 26 H. 8. makes a lease for 40 years to one *Pigeon* of the grange, and of the tithes of hemp, flax, corn, and hay, growing thereon, rendering rent for the same; and the lessor covenants that the lessee shall not pay the tithes of hemp, flax, corn, or grain, but that he shall pay the tithes of wool and lamb, and further, that he shall pay those tithes to the vicar and his successors; the statute of 31 H. 8. c. 13. is made: the lease expires: the parsonage is granted by the king to one, and the grange is granted to another; and the tithes of corn not being set out, *Dobitost*, the patentee of the parsonage, brings debt on the statute of 2 & 3 E. 6.

George Croke argued that judgement must be given for the plaintiff; for tithes of lamb and wool being paid at the time of the dissolution, and of the making of the statute of 31 H. 8. and a rent being likewise paid for the tithes of hemp, flax, corn, and grain; the grange cannot be said to be discharged from the payment of tithes at the time of the dissolution, and therefore is not within the compass of the statute of 31 H. 8. c. 13. For though those lands are to be discharged of the payment of tithes which were discharged at the time of the dissolution by reason of a perpetual union, as appears by 2 Rep. 47. the *archbishop of Canterbury's* case; yet if the tithes were paid, or if the tithes of any lands were leased out at the time of the dissolution, tithes ought to be paid for such land, as we learn from the case of *Greville and Trust*, 2 Rep. 48. and the case of the parson of *Peykirke*, 18 Eliz. Dy. 349. where tithes were paid, as in the case at bar, under a lease; and notwithstanding there was a lease made by the abbot himself, yet *de jure* he, being parson, ought to have tithes contrary to his own lease, according to 32 H. 8. and the case of *Perkins v. Hinde, Hill.* 31 Eliz. Rot. 138. where it was resolved, that if the parson of a parsonage impropriate makes a lease of part of his glebe reserving a rent, for all manner of exactions, matters, duties, and demands, yet he

If a religious house were seised of a rectory and lands within it *simul et semel*, and some of the tithes of those lands were in lease under a reserved rent at the time of the dissolution, they are now chargeable with the payment of tithes, for the payment of rent for tithes is an equivalent to a payment of the tithes themselves. Cro. Ja. 452. S. C. but not so fully reported.

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he shall have tithes notwithstanding this reservation, because tithes are spiritual things, and the general words extend only to temporal things; and though a rent was here reserved for the tithes, and the tithes themselves were not paid, yet it is all one: for the rent is in lieu of the tithes according to the case of 15 E. 3. *Fitzh. Execution* 63. where it is holden, that the rent reserved coming in lieu of the land, the rent may as well be extended as the land.

Bridgeman contra. He argued, that there not being any tithes of corn and hay paid at the time of the dissolution, no tithes should now be paid of them, because as to those tithes there was a discharge at the time of the dissolution. And this is evident from the above book of 18 El. Dy. 349. where it appears that the lands were discharged from the payment of all other tithes than those which were paid at the time of the dissolution, and from *Greville and Trot's case*, where it is holden that tithes shall not be paid of those lands which were discharged at the time of the dissolution. As to the objection, that the rent in this case comes in lieu of the tithes, that cannot be; for tithes not being a thing manurable, the rent cannot be said to issue out of them, any more than it can be said to issue out of the toll of a mill, or such other thing not manurable, as appears by 30 Aff. 15. 4 El. Dy. 212. and 7 Co. 23. *Butt's case*. And though the lessee is by law to pay tithes notwithstanding the reservation of rent, or feoffment made of the land, because tithes are distinct things from the land; as is evident from 41 E. 3. 13. 30 H. 8. and Dy. 43. yet it appears in this case by the covenant and by the lease itself that it was not the intention to have such tithes paid: wherefore there being a discharge *de facto* from the payment of tithes at the time of the dissolution of lands which had been discharged time whereof, &c. tithes shall not be paid now of them, according to 30 E. 3. 3. 21 H. 7. 9. and 31 E. 3. *Garraunt de Chartres* 22. where it is holden, that if the grantee of a rent disseise the terre-tenant, and make a feoffment with warranty, the feoffee shall vouch of the land discharged of rent; and yet there was only a discharge *de facto*, and not a discharge *de jure*. And the case of 44 Aff. pl. 45. was here cited. He further said, that if the king grant lands, which have been always discharged of tithes, they shall remain discharged.

Croke and Houghton justices seemed to think, that judgement ought to be given for the plaintiff. For they conceived, that there being tithes paid of some things at the time of the dissolution, and there being an express lease to the terre-tenant of the tithes of other things,
and

and a rent reserved for them, tithes should be paid now as well as in the case of *Greville and Trott*, 2 Co. 48. and 18 Eliz. Dy. 349.

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The case was moved again in Mich. term by *Davenport* on the part of the plaintiff, and *Coventry*, the king's solicitor, on the part of the defendant.

Davenport.—I conceive that as there was a lease of the tithes of corn and hay, and a rent reserved for them at the time of the dissolution in 31 H. 8. and as there was also a payment in kind of wool and lamb, there was not such a discharge from the payment of tithes at the time of the making of the statute, as that these lands so in lease should be ever afterwards discharged. For by the lease there is an express contract for the tithes; and where a tithe is paid in kind, or a rent is paid for it, the perpetual union which occasions the discharge does not exist, as appears by *Priddle and Napier's* case, 11 Co. 13 & 14. For 1st, it is evident, that tithes of themselves are an hereditament of that nature that neither unity of possession will cause a suspension of them, nor will livery cause an extinguishment of them, as we may see by 42 E. 3. 13. though a livery will extinguish a rent, according to 35 H. 6. 56. wherefore the union does not of itself make a discharge from the payment of tithes, or a suspension of them; but upon a perpetual union a constructive discharge is raised, because it would be infinite to drive the patentees to shew in what manner the discharge came, whether by a composition, or by a bull of the pope, &c. but it being apparent in this case that the discharge from the payment of tithes of corn and hay was only in respect of the contract, upon the dissolution of that contract and the determination of the lease tithes must be paid in kind. 2. It appears by *Priddle and Napier's* case, that the union which creates a discharge from the payment of tithes must have four qualities, viz. 1. it must be *justa*: 2. it must be *æqualis unio*: 3. it must be *perpetua unio*: 4. it must be *libera*, that is, free from the payment of tithes. But in this case there is no such union: for at the time of making the statute of 31 H. 8. there were tithes paid in kind of wool and lamb, and a rent was paid for the tithes of corn and hay. And it appears by *Trott's* case, 2 Rep. 48. that if the lessee pay tithes at the time of the dissolution, tithes in kind shall be paid afterwards: and though there is only a payment of rent for the corn and hay, and no payment of tithes in kind of those articles; yet the rent coming in lieu is all one with a payment of the tithes themselves. And upon this reason it appears by 31 E. 3. *Fitzh. Affets*, pl. 13. that a rent descending to a son and heir shall

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be affets, notwithstanding it be extinct upon the descent by reason of unity of possession; and 21 E. 3. 18. *P. N. B.* 223, 224. & 38 *Aff. pl.* 17. a rent extinguished by way of release to an abbot will be mortmain; and 11 H. 7. 12. the tenant upon whom a mesnalty descends, being within age, shall be in ward, and pay a relief for it, notwithstanding that the mesnalty be extinct in law; and in *Carre's* case, 26 *Eliz.* cited in 3 *Rep.* 30 b. it appears that a rent extinguished will make such a tenure *in capite*, that the king shall have a third part of the lands in wardship: and it appears by 37 H. 6. 26. that the payment of a rent of 6 l. by way of retainer is a having and holding within the condition of an obligation; and 28 H. 8. *Dy.* 15. it appears that such a retainer upon a release made to him is a purchase within the intent of a condition; and 13 H. 7. 16. the payment of an amercement for suit of court is a sufficient seisin of suit of court, for it comes in lieu of the suit. As to the objection, that the rent could not be paid in lieu of tithes, because it issues only out of the land, and not out of the tithes, according to 5 E. 3. 68. it may be answered, that though it issue only out of the land by way of remedy, for the grantor cannot distrain in the land; yet it issues out of the tithes by way of recompence, for the rent is a recompence for the tithes, and it is increased in respect of the tithes. And as to the objection, that an action of debt will not lie on the statute of 2 & 3 E. 6. for that the tithes of corn and hay have not been paid by the space of 60 years, and the statute wills, that *every of the king's subjects shall from henceforth set out, yield, and pay, all manner of their predial tithes in their proper kind as they rise and happen, in such manner and form as hath been of right yielded and paid within forty years next before the making of this act, or of right or custom ought to have been paid*; in the first place, inasmuch as the tithes of corn and hay have been paid by way of retainer, and a rent has been paid for them within that time, this shall be a payment within the act. 2. Notwithstanding there was not any payment *de facto*, yet because there must have been a payment *de jure*, if it had not been in respect of this real contract, this shall be said to be within the act. 3. Here is a payment of tithes in kind for part, and so the very words of the act are satisfied.

Sir Tho. Coventry e contra.—I conceive in the first place, that the unity of possession of the rectory and lands in the hands of the abbot of *Evesham* caused a suspension of the payment of tithes, though it did not make an absolute discharge of them; for in 30 H. 8. *Dy.* it is said, that if a parson purchase land within his own parish,

parish, the land by reason of this unity is made *non decimabilis*; and if it cause a suspension, then the clause of the statute of 31 H. 8. c. 13. extends to make it a perpetual discharge; for it says, that *all and every person and persons shall have, hold, retain, keep, and enjoy, &c. according to their estates and tithes, discharged and acquitted of the payment of tithes, as freely and in as large and ample manner as the said abbots, priors, abbesses, prioresses, &c. had, held, occupied, possessed, or enjoyed them, &c. at the days of their dissolution.* And this statute is to be expounded liberally, because it was the intention of parliament to advance the king's sales by the grant of these immunities, and to encourage people to purchase the lands; and for that reason, in the case of *Holliswell v. Johnson*, M. 39 & 40. Eliz. in the common pleas, it was adjudged, that where an abbot purchased a portion of tithes which another had in his lands, notwithstanding this unity did not make a perpetual discharge from the payment of tithes and an extinguishment of them, but, upon severance of the portion from the land, they would be again payable as before; yet it made a discharge upon the construction of the statute of 31 H. 8. so that the lands should be discharged from the payment of tithes in the hands of the patentee. And in the *New Book of Entries* 453. Hil. 1 Eliz. Rot. and 24 Eliz. *Rose and Spirling's* case, it appears, that upon the suggestion of a union a prohibition was granted. And this construction to have such discharge upon the union is not prejudicial to any one. For 1. the king sustains no loss; for what he loses in the rectory by the discharge, he recovers in the land. 2. Every one has benefit by it, because it settles quiet and repose. 3. This construction tends only to the preservation of ancient privileges *in esse* before the making of the statute of 31 H. 8.

2. I conceive, that the cause of the discharge by reason of union is not removed either by the lease, or by the reservation of rent: for as to the lease of the tithes of corn and hay, it would have been clear that if such lease of the rectory had been made to a stranger, the discharge would have continued the lease notwithstanding; for the discharge goes to the freehold as well as to the possession; wherefore the freehold being discharged at the time of the dissolution, it shall be said to be a discharge within this statute. And for this reason it is, that in the *bishop of Winchester's* case it was adjudged, that a copyholder of the bishop should be discharged of the payment of tithes; for the freehold and inheritance were discharged; and therefore the possession shall be likewise discharged. As to the

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cases of 18 *El. Dy.* 349. & 10 *Eliz. Dy.* 277. and *Trott's* case, cited in 2 *Rep.* 48. the case of 18 *Eliz.* proves directly, that tithes ought not to be paid of any other things than of wool and lamb, and that a prohibition should be granted as to all other tithes. And in the case of 10 *Eliz.* the discharge was personal *quamdiu propriis excoluntur*, upon which it was holden that the farmer should pay tithes: and in *Trott's* case, the lessee of the lands paid tithes of them to the abbot at the time of the dissolution: and in *M.* 40 & 41 *Eliz. Rot.* between *Benton* and *Trott* an issue was taken upon the payment of tithes: so that it should seem from this case, that notwithstanding there was a severance of the rectory and of the land, yet, if tithes were not paid for the land at the time of the dissolution, they shall continue discharged after the dissolution: for which reason in the case at bar, notwithstanding there was a severance of the rectory and of the land in the hands of the abbot, yet, inasmuch as for these lands so severed, there were not any tithes of corn and hay paid at the time of the dissolution, there shall not be any tithes paid at this day.

3. The union making a discharge, and no tithes of corn and hay being paid at the time of the dissolution, the reservation of the rent shall not charge the land with the payment of tithes of corn and hay: for the *reddendo* of the rent being generally *proinde*, it cannot extend to make the rent to be for the tithes, because not being things manurable in which a distress could be taken, a rent cannot issue out of them according to 11 *H.* 4. 40. and therefore the *proinde* must have relation to such things out of which a rent can arise. And though in 1 *H.* 4. it is holden, that a rent may be well enough reserved out of a mesnalty; and in 10 *E.* 4. out of a reversion; yet that is in respect of the possibility that the land may be charged: for the tenancy may escheat, and the particular estate may determine: but there is not any such reason in the case at bar.

4. The payment of tithes by way of retainer cannot be any such payment, because that might be alleged upon all unions whatsoever, and so no union would make a discharge, which is contrary to the statute of 31 *H.* 8. which operates a discharge in cases where there is a union and no payment of tithes. As to the covenant that the lessee shall not pay any tithes of corn and hay, that cannot mend the matter, and indeed it rather enforces the contrary, viz. that tithes ought not to be paid.

5. An action of debt does not lie upon the words of the statute for the tithes of corn and hay, because, until the 26 *H.* 8. no tithes

it all were paid, nor were any afterwards paid of corn and hay; so that no tithes being paid by the space of 40 years before, an action of debt cannot now be maintained within the statute. As to the objection, that tithes, notwithstanding the union, *of right ought to be paid*, and therefore it is within the compass of the statute; it appears by 30 H. 8. Dy. that unity of possession of the land and rectory is what makes it *non decimabilis*. And as to the objection, that a rent has been paid for the tithes, which is a sufficient payment within the statute; it appears by the words of the statute which will have the payment of all predial tithes in their proper kind, as they have been paid by the space of 40 years before, that the payment within the 40 years must be a payment in kind, and not a payment of a rent in lieu of the tithes. Besides, if payments beyond 40 years might be raked up, that would be a means of raising much debate, and it would be such a construction too as would make the words "*by the space of 40 years*" void and idle; and it would be hard to subject a man to the penalty of treble damages where no tithes in kind were ever paid by the space of 40 years. And there is a difference, where an abbot, who was parson imparsonnee, made a lease for years of land lying in the same parish as the rectory; and where the king's patentee of an impropriate parsonage at this day makes a lease for years of his lands. For though the lessee in the first case ought to pay tithes, because they were spiritual things belonging to the pastor of his soul, and do not pass included within the land, as we see in 30 H. 8. Dy. 43. & 32 El. Perkins and Hynde's case, where a lease for years was made of land, reserving rent for all exactions and demands, and it was holden that the lessee should pay tithes; yet in the other case the lessee or alienee of the glebe should not pay tithes, because they stood discharged from the payment of tithes upon the statute of 31 H. 8.

Montague C. J. Croke, Dodderidge, and Houghton J. held that judgement should be given for the plaintiff. For in the first place they resolved, that unity of possession of the lands and rectory is not any extinguishment or suspension of tithes at all, tithes being a duty merely collateral to the land, and not anyway appertaining to it. And they may be resembled to a warren, which is a distinct thing from the land, and therefore not extinguished by a feoffment of the land according to the book of 35 H. 6. as a rent or remainder are. And upon this reason it was adjudged, that if a lease for years be made of land reserving a rent for all exactions

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and demands, the lessee shall pay tithes of his land, because they are not issuing out of the land, nor appertaining to it, but are a mere collateral duty, due to the pastor in respect of his feeding our souls; and though the union occasions a suspension of the payment of tithes, because a man cannot pay tithes to himself; yet it does not occasion a suspension of the tithes, but they come into *esse* as soon as there is any one who is capable of taking them.

2dly. They resolved, that a unity of possession of the land and rectory in the hands of the abbot at the time of the dissolution in 31 H. 8. if it had the four properties and qualities mentioned in *Priddle* and *Napier's* case, is a sufficient discharge from the payment of tithes within the statute of 31 H. 8. so that the surmise of such a union would be a good ground for a prohibition, if there were any suit for tithes against it: for when such union has continued time whereof, &c. it shall be intended that there was some composition or bull of the pope which gave a discharge from the payment of tithes, but which the party shall not be driven to produce by reason of the great inconvenience that might ensue from the infiniteness of search for such things; and in order to avoid that inconvenience the allegation of unity time whereof, &c. hath been allowed to make a discharge from the payment of tithes.

3dly. They resolved, that unity of possession of the land and rectory *simul et semel* at the time of the dissolution is not sufficient to discharge lands of the payment of tithes after a severance has been made of the land and rectory, if it appear to the court that there was not any composition or bull of the pope to discharge the land of tithes, but only a unity of possession; for then it appears that there was only a discharge *de facto* from the payment of tithes, because by reason of the union the abbot could not pay tithes to himself, and there was not any discharge *de jure* of the lands from tithes; and it must be, or be intended to be by reason of some composition or papal bull, where the lands shall be discharged by 31 H. 8.

4thly. They resolved, that the lease of the tithes of corn and hay to the lessee in the lease of the lands, and the reservation of rent *proinde*, make an exposition or explanation that the lands were only discharged of the payment of tithes by reason of the unity of possession of the lands and rectory in the hands of the abbot, and not a discharge of tithes by any composition or papal bull, or any other manner by which there should be a discharge *de jure*. For if there had been any discharge *de jure* by composition or papal bull, then there would be no occasion for any contract for the tithes of the lands, because the tithes ought

ought to be paid of them in kind : but the discharge being only in respect of the unity of possession, there, without a contract made for the tithes, tithes are to be paid by the lessee ; and here upon the lease by which there is a severance of the land and rectory, the cause is taken away which occasioned the suspension of the payment of tithes. And for this reason it is that it was adjudged in *Trott's* case, that if the lessee of an abbot at the time of the dissolution paid tithes at the time of the dissolution to the abbot, the lands should be afterwards charged with the payment of tithes ; because the payment of tithes to the abbot was a declaration that the lands were only discharged of the payment of tithes by reason of a unity of possession, and were not discharged of them *de jure* ; so that when the unity of possession was afterwards determined by the severance of the lands from the rectory by the king's grant, then tithes should be paid for those lands, and as they were payable before the unity of possession : for the statute of 31 H. 8. extends only to the discharge of payment of tithes *in right*, and not to a discharge of payment of tithes *in fact* without right, agreeably to the exposition of the statute of *West. 2. c. 1.* which saith, *quod finis ipso jure fit nullus*, which is understood to avoid a fine as to the binding of the possession, not as to the binding of the right. 5thly. They resolved, that the payment of the tithes of wool and lamb, if there had not been any contract for the tithes of corn and hay, nor any rent reserved for them, would have been a sufficient payment at the time of making the statute of 31 H. 8. to have made the lands chargeable with the payment of the tithes of corn and hay. For the payment of wool and lamb was a sufficient declaration that the lands were merely discharged of the payment of tithes in respect of unity of possession, and therefore a payment of part of the tithes is as good as if all manner of tithes had been paid. 6thly. They held, that the payment of rent in lieu of the tithes was a payment of the tithes, and amounted to as much ; because the rent was reserved for the tithes, according to the book of 31 E. 3. where it was holden, that the seisin of an amercement for suit of court was a sufficient seisin of suit of court, &c. seisin delivered to the sheriff of a horse upon a recovery had of rent is a sufficient seisin of the rent according to *Perkins* ; and a seisin of a rose is a seisin of other rent that may accrue due afterwards, according to *Bevil's* case in the 4 Rep. And as to the objection, that the rent does not issue out of the tithes because they are not manurable, they said that the rent issues out of them by way of recompence and by way of increase, because

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the rent would not be so large but in respect of them. And by *Croke*, upon an eviction of the tithes there shall be an apportionment of the rent, though it does not issue out of the tithes by way of remedy, so that a distress might be had of them, if the rent be arrear, or that upon an assize brought for the rent the tithes might be put in view. And by *Houghton*, if a bishop make a lease for years of tithes, rendering rent, and die, the rent shall not go to the successor, because there is not any local possession upon which a distress can be taken for it. 7thly. By *Dodderidge* and *Montague*, the retainer of the tithes of corn and hay by the lessee by virtue of the covenant is a sufficient payment of the tithes to put the owner of the lands out of the benefit of the statute of 31 H. 8. for the payment of itself by way of retainer is of the same nature with an actual payment; and the rent or tithes so retained shall be said to be things *in esse*, and an account shall be made of them accordingly; for which reason in 7 H. 7. the rent which the tenant had by way of retainer upon the descent of the mesnalty was as *in esse* as to the land; and *Perkins* in 41 E. 3. the feme tenant being to be endowed of the third part of the seignory by reason of her intermarriage with the lord, may retain the third part of the rent without any assignment of dower, and it shall be said as a payment to her; and 21 E. 3. *Exchange* an exchange by release of a rent is good, because a retainer of a rent is all one with payment of a rent out of other land to him; and 45 Aff. pl. where tenant for life recovers in value the rent reserved upon a lease for life, this retainer of the rent shall be of the same nature with the payment of a rent *in esse*; and where the lord disseises the tenant whereby he pays himself the rent by way of retainer, this rent so retained shall be recouped in damages upon an assize brought, as if it had been paid to him: but by *Croke*, if the parson disseise another of his land, in this case the tithes shall not be recouped in damages upon an assize brought, because tithes are a duty collateral to the land. 8thly. They resolved, that an action of debt on the statute of 2 & 3 E. 6. lay well enough for the plaintiff. For 1. the lands being discharged only in respect of a unity of possession, there was not any discharge in right, wherefore since the lands ought to have paid tithes, though there was no payment in fact of the tithes of corn and hay by the space of 40 years, yet an action may well enough lie upon the statute which hath the words "*or of right ought to be paid:*" for the statute goes to an absolute right of discharge. 2. Here has been a payment in kind of tithes of wool and lamb

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lamb always, which is a sufficient payment within the words and meaning of the statute: for if tithes of one kind only have been paid by the space of 40 years, yet, if the soil be changed so that tithes of another kind are to be paid, this payment of tithes of another-kind is a sufficient payment within the meaning of the statute 3. The retainer of the tithes by way of covenant is a sufficient payment within the meaning of the statute. For if I contract for the tithes of *Blackacre* for 40 years, and afterwards I purchase *Blackacre*, so that now I have the tithes by way of retainer; this having of the tithes by way of retainer will be a sufficient payment within the meaning of the statute, so that after the 40 years expired, if the tithes are not set out, an action of debt upon the statute of 2 & 3 E. 6. will well lie. But *Dodderidge* hesitated more upon this point than upon the other: for the statute of 2 & 3 E. 6. being a law which gives a remedy for not setting out tithes where there was before no remedy at common law, ought to be followed; and the statute directing that there must be a payment within 40 years to found an action upon it, that action fails if there has been no payment within 40 years. Besides, it is to be observed, that the plaintiff who brings this action, is a layman, and a layman was not capable of tithes at common law, as we see in *Wright's* case in 2 Rep. and therefore as the statute makes him capable of tithes and of suing for them, he must sue for them as the statute enables him. And he conceived that the insertion of 40 years in the statute, and neither a greater nor a less number of years, was for this reason, viz. for that by the canon law as 20 years possession makes a prescription for the church, so the being out of possession by the space of 40 years would be a sufficient prescription against the church, and therefore if there has been no payment of tithes for the space of 40 years, which makes a prescription against the church, there shall not be any remedy allowed upon this law to enforce a payment. And *Montague* said, that all lands were tithable at common law, but that afterwards the pope out of his respect to religious persons discharged all the orders of monks from the payment of tithes; which being found inconvenient, for that *filia devoravit matrem*, *Paschal* the second confined the discharge to certain orders, viz. the Cistercians, Templars, and Hospitalers, which orders also increasing, *Adrian* the 2d made a constitution that only those lands *quæ propriis ipsorum manibus excoluntur* should be discharged. And he said further, that the unity of possession which will make a discharge from the payment of tithes upon

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And afterwards M. 17 Ja. in another action of debt between the same parties, it was ruled in evidence, that tithes ought to be paid, and that there was no such union in this case as would make a discharge from the payment of them.

M. 15 Ja. A. D. 1617. B. R.

: *Saunders v. Sandford.* [MSS. Calthorpe.]

A portionist may declare generally on the statute of 2 & 3 E. 6. without setting forth his title. Cro. Ja. 437.

IN an action of debt upon the statute of 2 & 3 E. 6. c. 13. after verdict for the plaintiff it was moved in arrest of judgement by *George Croke*, that the declaration was insufficient, because it only stated generally that the plaintiff was seised of a portion of tithes of such lands, and made no title to the portion, which it ought to do, for a layman is not capable of a portion of tithes without special matter; and in 7 E. 6. Dy. 83. it appears that there is a manifest diversity between a rectory and a portion of tithes. *Sed non allocatur*; for by *Montague* chief justice, *Croke*, *Dodderidge*, and *Houghton*, justices, there is no difference in reason between a rectory and a portion of tithes; for a layman without special matter is no more capable of the one than he is of the other; and as it has been often adjudged, that a claim merely as *proprietary* of a rectory generally without shewing any title is good enough, the declaration in the case at bar, though it disclose no title, must likewise be good enough. Besides, the action being an action founded on a tort, and to punish a tort; and not being founded upon a title, it cannot be necessary to set forth the plaintiff's title. If indeed it were an action founded upon title, so that the right might come into question, in that case undoubtedly a title ought to be shewn, and if the plaintiff shew an insufficient title he shall never have judgement.

In a declaration on the statute it is not necessary to state the value of every particular kind of grain carried away.

It was next objected, that the declaration was insufficient, because it states generally the asportation of so much grain of several kinds, and yet does not state the value of each, as the precedents are, so that it may appear to the court, that the demand is according to law. *Sed non allocatur*, for the demand being of a certain sum, it is sufficient, though the value of each particular thing be not expressed.

M. 15 Ja. A.D. 1617. In Chancery.

Dunn v. Burrell and Goffe. [MSS. Calthorpe.]

THIS case, which was argued by sir *Francis Moor* serjeant at law, and *Walters* of the Temple, before sir *Francis Bacon*, lord keeper, assisted by the chief justices *Montague* and *Hobart*, and the justices *Dodderidge* and *Hutton*, was as follows:

Burrell being seised in his demesne as of fee of a house called *Queen Acre*, and a shop and warehouse in the parish of *Gracechurch* in *London*, for which a rent of 5 l. *per annum* had been usually paid, in the 3d of *James* made a lease by indenture for 5 years of part of the house and of the shop at the rent of 5 l. *per annum*, payable at the four usual feasts by equal portions; and in that indenture of lease it was covenanted and agreed that *Withers* the lessee should pay 150 l. in the name of a fine and income, which was distributed into several payments of 30 l. each, to be made at the same feasts at which the rent of 5 l. was reserved to be paid. The term expires. *Burrell* afterwards in 10 *Ja.* made a lease for 7 years by indenture to one *Goffe* of the said part of the house and of the warehouse, under the rent of 5 l. *per annum*, payable by equal portions at the feasts of *St. Michael* the archangel and the *Annunciation*; and in the same indenture it was covenanted and agreed, that 175 l. should be paid to *Burrell*, his heirs, executors, and assigns, in the name of a fine and income, by several payments of 25 l. *per annum*, to be made at the same feasts, at which the reserved rent was to be paid by equal portions, that is, 12 l. 10 s. at the one feast, and 12 l. 10 s. at the other feast. *Dunn*, parson of the church of *Gracechurch*, preferred a petition to the mayor of *London*, stating that *Burrell* and *Goffe* did not pay him their tithes according to the rate of the fine that had been so reserved, and sentence being pronounced against him, he, upon the decree established by the statute of 37 *H. 8. c. 12.* which enacts, "that if any of the said parties find themselves aggrieved
" with the end made by the mayor and his assistants, that then the
" lord chancellor of *England* for the time being, upon complaint to
" him made within three months next following, shall make an end
" in the same, with such costs to be awarded as shall be thought
" convenient," &c. exhibited his bill of appeal to the lord keeper, in which he set forth the whole matter *supra*, and the statute of 27 *H. 8. c. 12.* and recited that part of the decree which wills, "that
" the

The ancient rent was reserved upon a house in *London*, and also a further sum by way of fine and income: Qu. Whether tithes are payable under the decree of 37 *H. 8.* according to the ancient rent only, or according to the ancient rent and the sum reserved by way of fine and income? See an abstract of the arguments in this case in *Calthorpe's Customs of London*, 93.

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“ the citizens and inhabitants of the said city and liberties of the
 “ same for the time being, shall yearly without fraud or covin for
 “ ever pay their tithes to the parsons, vicars, and curates of the
 “ city and their successors for the time being, after the rate here-
 “ after following ; (that is to wit), of every 10 s. rent by the year
 “ of all and every house and houses, shops, warehouses, cellars, and
 “ stables within the said city and liberty of the same, 16 d. ob. and
 “ of every 20 s. rent by the year of all and every such house and
 “ houses, shops, warehouses, cellars, and stables, and every of them,
 “ within the said city and liberties, 2 s. 9 d. and so above the rent
 “ of 20 s. by the year, ascending from 10 s. to 10 s. according to
 “ the rate aforesaid. And where any lease is or shall be made of
 “ any dwelling-house or houses, shops, warehouses, cellars, or
 “ stables, or any of them, by fraud or covin, reserving less rent than
 “ hath been accustomed, or is, or that any such lease shall be made
 “ without any rent reserved upon the same by reason of any fine or
 “ income paid beforehand, or by any fraud or covin, that then in
 “ every such case the tenant or farmer, tenants or farmers thereof,
 “ shall pay for his or their tithes of the same, after the rate aforesaid,
 “ according to the quantity of such rent or rents, as the same
 “ house or houses, shops, warehouses, cellars, or stables, or any of
 “ them, were last letten for, without fraud or covin, before the making
 “ ing of such lease.” To this bill of appeal the defendants put in
 their answer, in which they set forth that there never was any
 greater rent reserved than 5 l. *per annum*, and that they were ready
 to pay according to that rate ; and they traversed the fraud and
 covin. To this answer *Dunn*, the complainant, demurred.

More serjeant argued for the complainant.—I conceive that the
 decree of the mayor is erroneous in two points—1st. in not ad-
 judging the reservation of 5 l. *per annum* by way of fine and income
 to be a fraudulent reservation to avoid the statute of 37 H. 8. c.
 12. and 2dly. in not adjudging *Burrell* to pay according to the
 25 l. *per annum* which he had so reserved by way of income. The
 case divides itself into two points. The first is, whether this re-
 servation of 25 l. *per annum* by way of fine and income be a fraud
 and covin within the decree, so that in determining the rate at
 which the tithes shall be paid, respect shall be had to it ; and this
 is upon the body of the decree. The 2d point is, upon the addi-
 tional clause of the decree, which wills, that if any lease shall be
 made reserving a less rent or no rent, &c. and it is whether respect
 shall

shall be had to what was reserved by way of fine and income in the lease to *Withers*.

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As to the first point, it is evident by *Dr. Grant's* case that houses may by custom well enough be charged with the payment of tithes: for houses and shops being things in which persons exercise their trades and gain their livelihood, it is but reasonable that there should be a contribution to the minister out of them, as well as out of lands.

Supra 259.

In the case of *Green and Piper* in the king's bench in the 34th of *Eliz.* where a prohibition had been granted upon a suggestion that a house in *London* was parcel of the possessions of an abbey which was discharged of the payment of tithes by virtue of a papal bull at the time of passing the statute of 31 *H. 8. c. 13.* of monasteries, a consultation was afterwards awarded, because the statute of 37 *H. 8. c. 12.* was subsequent to the statute of 31 *H. 8.* and by that statute no houses in *London* were exempt but the houses of noblemen. This being so then, that houses by a reasonable custom may be charged with the payment of tithes, it now remains to examine the fraud in the case at bar; for the better discussion of which I would proceed by three gradations. The first of which shall be to shew what eye the common law had to fraud without the aid of any statute: The next shall be to shew what consideration the law had to encounter fraud for the evasion of any statutes in which there was not any express provision made against fraud. And the third shall be to shew the beneficial exposition of those statutes which have made provision in express words against fraud. As to the first point it appears by 34 *E. 1. Garrante* 88. 19 *E. 2. Affets* 3. 13 *Eliz. Dy.* 291. that where tenant in tail after a feoffment with warranty of his lands in tail made a feoffment in fee of his lands in fee simple to his son and heir in order to avoid a descent of affets, it was adjudged to be a fraud at common law, so as not to prevent the descent of the affets. And the 24 *E. 3. & 4 & 5 Ma. Dy.* 160. where one indebted to the king had fraudulently with the king's money purchased lands in the names of his friends, those lands were holden liable to the payment of his debts. In *Fitzherbert's* case, 5 *Rep.* 79 *b.* a collateral warranty was avoided, and adjudged to be a warranty commencing by disseisin, by reason of fraud. And in 1 *Ma. Dy.* 99 *b.* a sale in a fair did not change the property of a horse, where the contract was made out of the fair. As to the second point, where any person would by a device evade a statute which has no express provision in it against fraud, the common law will throw in its aid and protection; and to that purpose, upon the statute of

Supra 164.

Gloucester,

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Cited in
Moore
789.Hob. 165.
193.

Gloucester, c. 11. which gives remedy to the termor upon default of the reversioner, it was holden, that if the tenant vouch, and the vouchee make default, it is within the equity of the statute; for such slight shall not protect the fraud. And in *Elmer's case*, 5 Rep. 2. a surrender upon condition shall not be taken to be a surrender within the 13th of *Elizabeth*. And in 5 Rep. 14. *the case of ecclesiastical persons*, it is holden, that the losing by action tried in a writ of annuity after aid prior of the patron and ordinary is fraud within the statute of 13 *Eliz.* And in 11 Rep. 66 b. *Magdalen College case*, the permitting of a fine to be levied by the disseisor, and five years to pass, is within the statute of 13 *El.* which speaks of conusees. And 43 *Eliz.* in the case of *Pawlet and Fry*, it was ruled by *Popham* and *Anderson*, that where a dean and chapter borrowed 1,000 l. which came to the use of the dean and chapter for the payment of their debts, and bound themselves in the penalty of 2,000 l. for the payment of 1,000 l. at a certain day, and afterwards a judgement was had upon this obligation, upon which a defeasance was made, that, if the dean and chapter, after the expiration of 15 years, should make a lease to *Fry* agreeably to the first contract, that then, &c. this judgement was avoided by the statute of 14 *Eliz.* which makes all covenants and bonds void, it being merely a fraud to evade the statute, which shall not be permitted. As to the 3d point, which is the beneficial exposition of statutes that have made an express provision against fraud, it is ruled by 21 *E.* 3. 28. that a release to an abbot of a rent is mortmain, notwithstanding the statute of *magna charta, c. 36.* *wills quod non liceat alicui dare*, and this cannot be said to be a donation. So upon the statute of 7 *E.* 1. *de religiosis*, which prohibits alienations to religious persons *arte vel ingenio*, it hath been adjudged, that a recovery by default without title is mortmain, as appears by the statute of *West.* 2. c. 32. So in 48 *E.* 3. 29. & 38. where a recovery has been upon the default of the vouchee; it hath been adjudged within the statute. So 3 *E.* 4. 14. an estate gained by way of eloppel upon *nul waste* pleaded, hath been adjudged within the statute. So a case in 14 *Ja. Rot.* 1026. in the common pleas, between *Winchcombe* and *Pulleston*, upon the statute of 31 *Eliz.* c. 6. which prohibits a presentation for money to a benefice with cure either directly or indirectly, it was ruled, that where *Say* for 90 l. contracted with *Waller* to present him to a church after the death of an incumbent who then lay *in extremis*, and to that intent procured the next avoidance to be granted to one *Ebden*, who after the death of the incumbent presented *Say* without taking any money

or reward, that this was simony, notwithstanding the person who presented received no money, because the grant of the next avoidance was part and derived out of the first contract, which was clearly simoniacal, and merely a trick to defraud the statute. And notwithstanding in 3 *Eliz. Dy.* 193. & 10 *Eliz. Dy.* 267. it was ruled, that a feoffment to the intent to defraud creditors shall not be construed to be a fraud to deceive the king, because it was not made with that intent; yet, upon the first clause in the statute of 27 *El. c.* 4. which mentions fraudulent conveyances made to the intent to defraud purchasers, it is ruled in *Burrell's case*, 6 *Rep.* 72. that where a lease was assigned in order to avoid an extinguishment, it was fraud within that statute: and upon the second clause of the statute which speaks of estates made with power of revocation, it is ruled in *Bullock and Standen's case*, 3 *Rep.* 82 *b.* that a power of future revocation after the death of another, or a power of revocation with the assent of others, shall be deemed a fraudulent conveyance within that clause of the statute. In the case at bar then, which is a case which affects religion, which is a case that concerns our God, a favourable construction shall be made, that this slight of a reservation of rent by way of fine and a sum in gross, shall not defeat the parson of that which is justly due to him.

As to the 2d point, which is upon the additional clause of the statute made to meet future fraud, it consists of two mischiefs and one reason. The first mischief is, where a lease is made of a house, and there is a reservation of less than the accustomed rent. The second mischief is, where there is no reservation of any rent at all. And here we are within one of the mischiefs; for whereas under *Withers's* lease there was a reservation of 35 *l. per annum*, here there is a reservation of only 30 *l. per annum*, and so there is fraud and covin, as has been proved above. And there is not any fine or income paid before-hand, as the statute mentions, but it is future, if any be, which shews the fraud more apparently. And if a greater rent than the ancient rent be reserved, it is out of both of the mischiefs of the additional clause; so that I conceive if a lease of a house in *London* be made *bonâ fide* for natural affection to the son of the lessor without reserving any rent, the parson will lose his tithes: for it is out of the additional clause, the non-reservation of any rent being in respect of the advancement of the son, and not in respect of any income paid, or by reason of fraud and covin. But, if the lease be made only in trust for the lessor, then it will be within the additional clause,

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clause, for the trust shall be said to be fraud and covin, and so it will be within the penalty of the statute, which says that the parishioner shall pay his tithes according to the rate of the ancient reservation; wherefore in the case at bar, *Goff* and *Burrell* must pay their tithes according to the reservation under *Withers'* lease, which shall be said to be made by fraud and covin as well as the reservation under the lease to *Goff*. And the last clause which gives the penalty that the parson shall have at the rate of the ancient reservation, does not take away the benefit of the first clause, which gives him the tithes according to the rate of 2 s. 6 d. for every 20 s. rent. So upon the statute of *West. 2. c. 3.* where the one clause gives to a feme a *cui in vita*, if the other clause gives to her a receipt for the default of her baron, it hath been adjudged in 38 *E. 3. 12.* that if a feme being received for the default of her baron make default, whereby a recovery is had against her, yet, after the death of her baron, she may well have a *cui in vita*; for the latter clause does not take away the benefit given to her by the former. So, upon the statute of 27 *El. c. 2.* which has one clause as to conveyances made with intent to defraud purchasers, and another as to conveyances made with a power of revocation, it hath been adjudged in the case of *Standen* and *Bullock*, cited in *Twine's* case, 3 *Rep. 86.* that a *bonâ fide* purchaser shall have the land, where the power of revocation has been extinguished by fine or any other such instrument, for the latter clause respecting a power of revocation does not deprive the purchaser of the benefit of the former clause.

As to the objection, that this which is reserved by way of fine and income, is a sum in gross, and not a rent, because it is not incident to the reversion; I answer that it has the properties and qualities of a rent. For the fine is reserved in the same deed and at the same time with the rent; it is made payable at the same time with the rent, and the same means may be taken for the recovery of it; for the lessor may either distrain for it, or have an action of covenant. This being so, it is at least a rent in reputation, though it be not a rent *re verâ*; and if it be a rent in reputation, that will be sufficient within the statute of 37 *H. 8. c. 12.* as a chantry in reputation shall be said to be a chantry within the statute of *chantries*, as we see in *Adams* and *Lambert's* case, in 4 *Rep. 104.* and in 5 *Rep. 3.* *Jewel's* case, where there was a rent reserved upon the lease of a fair, it was said to be a rent in reputation, and that an action of debt would lie upon the contract.

Walter

Walter contra.—The case, he said, was briefly this—*Burrell* being seised of a house which from time immemorial had been let for 5 l. *per ann.* makes a lease of part of it, reserving the rent of 5 l. *per ann.* with a covenant also for the payment of 175 l. in the name of a fine and income to be paid in several sums of 25 l. *per ann.* during the term (that is) 12 l. 10 s. at the one feast day in the year whereon the rent was made payable, and 12 l. 10 s. on the other feast day. And I insist that the parson is only to have his tithes after the rate of 5 l. *per ann.* and not after the rate of 30 l. *per ann.* To support this I will shew in the first place that tithes were not due for houses by the common law of the land, and before the making of any statute to that purpose. 2dly. I will shew that the constitutions and ordinances of the pope cannot make tithes payable for those things which are discharged of common right. 3dly. I will shew that an act of common council in *London* cannot lay the imposition of tithes upon houses discharged by the common law of the land. 4thly. I will shew that the words of the decree and act of 37 H. 8. c. 12. do not extend to the fine and income in the case at bar. 5thly. I will shew that by the equity and intent of the statute, tithes are not to be paid according to the rate of the fine and income.

As to the 1st. of common right and by the common law of the land, tithes are not due, nor are they payable of any thing but what yields an increase and a renewing profit, and not of those things which neither increase nor renew, but rather decrease; of which nature are houses, which require repairs; and therefore it is said in *F. N. B. 53 E.* that tithes shall not be but of such things as increase from year to year by the manure of man. 2d. Houses being of the inheritance, and the rent reserved being of the same nature; tithes are not payable of them; for by the rule in law tithes are not to be paid of any part of the inheritance, but only of those things which renew; and it is for that reason that tithes are not payable of coals, flates, &c. for they are part of the inheritance and not renewing. 3d. Houses being things necessary for habitation, and contributing to the benefit of the parson in another way, tithes are not to be paid for them; and upon this principle it was adjudged in the king's bench in 31 *Eliz.* that tithes are not payable for the agistment of draught oxen, because they are used in the cultivation of the land, and tend to the benefit of the parson in another way. And in *Broughton's* case, in the king's bench in 32 & 33 *Eliz.* it was ruled, that tithes are not payable for the agistment of draught oxen or a riding gelding, because they yield an increase in another way,

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and are things of necessity and of help. In the case at bar then, houses are things of necessity for the rest and habitation of man, and for protection against the weather; and not giving any increase, (for there is neither grass nor corn raised in them), tithes ought not to be paid for them. And *Finchden*, in 38 E. 3. says, that the only tithes in *London* are oblations and obventions called rate-tithes, and that there are no other. And as custom may discharge a spiritual person from the payment of tithes, I do not deny but that custom may create a rate-tithe, and charge those things with the payment of tithes, which of themselves are discharged in law, as is agreed in *Dr. Grant's case*, 11 Rep. and accordingly we see in the decree of the statute of 37 H. 8. that the houses of noblemen are discharged of rate-tithes. In the case of *Dawson and Green*, in the king's bench, in 34 Eliz. and in *Dr. Leyfield's case*, in the common pleas, in Tr. 14 Ja. it was adjudged, that houses were at common law discharged of the payment of tithes.

As to the second point, respecting the validity of the ordinances and constitutions of the pope, I submit, that an ordinance of the pope cannot bind my temporal inheritance: and therefore where there was an ordinance of the pope for the payment of 2 s. 6 d. in every pound of rent reserved in *London*, it was of no validity; for the pope, though he had power to dispense with any act done against the canons of the church, as we find by 2 H. 4. yet he had no power to alter the law and to charge my inheritance: and therefore, though he might dispense with the holding of several benefices, and though he might by his dispensation empower one to hold a church in *commendam*, notwithstanding his entry into religion, (for these are merely dispensations with the canons of the church), yet he could not alter the law of the land, and charge the inheritance of any man. It hath been thereupon adjudged, that a provision made by the pope is void in law against the patron, inasmuch as it is an impoverishment of his inheritance. So, a licence by the pope to a monk to hold a temporal inheritance is void in law according to 3 H. 6. for the entry into religion being a civil death, the monk cannot, by the common law, have the land afterwards. So, in 1 H. 7. it is agreed, that the pope cannot make a sanctuary, though he may consecrate it after it is made by the king. So, in *Grendon's case* it is holden, that the pope cannot make an appropriation, any more than he can make a union according to 11 H. 7. for it concerns a temporal inheritance.

As to the third point, namely, the power of the common council in *London*: though an act of common council may bind men in point of order and government, yet it has not power to bind them in point of their inheritance. The act, therefore, of the common council, which, together with the constitution of the pope, imposed upon every inhabitant of *London* who paid 10 s. rent, an offering of a farthing on the vigil of every feast day, which were 85 in number, was not binding. For, as it appears in 5 *Rep.* in the *Cases of Bye-laws*, though the tenants of a manor may make a bye-law that a commoner shall not turn his beasts upon the common until such a day, yet they cannot make a bye-law to exclude a commoner from his common, because that concerns his temporal inheritance, which cannot be bound by such a bye-law.

As to the fourth point, the body of the act being for the payment of 16 d. for every 10 s. rent, the letter of the act extends only to the case of a rent, so that if there be no rent, then the body of the act will not extend to it; and the fine of 25 l. which is to be paid annually over and above the 5 l. is not a rent: 1st. Because it does not issue out of the land. 2dly. Because there can be no distress for it of common right, as for a rent. 3dly. Debt will not lie for it, as for a rent. 4thly. It is not incident to the reversion. 5thly. It will not descend to the heir, as a rent will; as in a case of 10 *Eliz. Dy.* where a covenant was to pay a sum in gross to another and his heirs, it was holden, that it could not descend. 6thly. If part of the reversion be granted away, there will be no division or apportionment of it, as there would be of a rent. 7thly. An entry of the lessor into part of the house will not cause a suspension of it, as it would of rent, according to the resolution in *Albany's case*, in 33 *Eliz.* where there was a proviso to pay such a sum as in the present case annually; and it was holden, that entry into part did not suspend the condition. It being then no rent, the letter of the decree of 37 *H. 8.* will not extend to it; and if it be not within the letter of the decree, neither will it be within the equity of it; for it is a penal law, and therefore shall not be extended by equity. 2dly. The body of the act directs that there shall be a payment without any fraud and covin; so that the body of the act only makes it to be a fraud and covin where the payment is not according to the quantity of the rent; and the fraud and covin, if there be any, will not make that to be rent, which the law says is not rent. And to talk of fraud against the common law, and against the statute, is not to the purpose; since the whole

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question arises merely upon the act which creates the payment of tithes where, in the eye of the common law, none were before payable. As to the cases which have been cited on the other side against frauds at common law, they do not meet the case in question, inasmuch as in those cases the fraud was committed in prejudice of a person who had an interest in being at the time it was committed: as in *Fitzherbert's case*, 5 Rep. 78. the person who was to be bound by the collateral warranty, had an interest in being at the time. So, in 24 E. 3. 10. the king had a debt in being at the time; and in 34 E. 1. *Garrante* 88. the feoffee of the lands had an interest in being at the time of the feoffment of the lands in fee simple. But in the case at bar, at the time of making the lease and committing the fraud, there was no interest in being in a greater rent than the rent of 5 l. *per ann.* for no one could claim the tithes for a greater rent than 5 l. If then that be so, the fraud cannot extend to it, as it might do to an interest in being. And as to the case in 34 E. 1. *Garrante* 88. if the feoffment to the son in fee simple of the lands had been prior to the feoffment of the lands in tail, there would not have been any fraud at the common law, because the feoffee of the lands would have had no interest therein at the time of the feoffment to the son. So in the case at bar, because there was only a rent of 5 l. *per ann. in esse* at the time of the fraud committed, (admitting that there was any fraud at all), the common law can give no aid; neither can the statute of 37 H. 8.; for if any aid were given, it must be either upon the body of the decree, or upon the additional clause of the decree; and as to the body of the decree, which says, that the citizens and inhabitants, &c. shall, without fraud and covin, pay for every 10 s. rent by the year 16 d. it does not give any aid for the payment of more than after the rate of 5 l. *per ann.* because there is no more rent reserved; for the other 25 l. *per ann.* reserved is not a rent, as I have shewn already. And as to the additional clause in the decree which directs, that if by fraud or covin any less rent than the accustomed rent, or no rent shall be reserved, that will not aid; for here is the rent of 5 l. *per ann.* reserved, which is the ancient and accustomed rent, and so it is out of the provision of the additional clause of the act.

And as to the fifth point, namely, that the equity and intent of the act will not extend to the fine of 25 l. it appears by the additional clause, that it only points to the ancient and accustomed rent, and not to any new advancement of the rent: For, 1st. there

is not one word of any increase of rent throughout the whole decree. 2dly. The clause which says, that if a lease shall be made of any house, &c. by fraud or covin, reserving less rent than the accustomed rent, shews that it was not the intent of the statute to meddle where there was any greater rent reserved than the ancient and accustomed rent. 3dly. The penalty expressed in the act where a less rent than the accustomed rent, or no rent at all, is reserved, shews that the act looks only to the reservation of the ancient rent; for the penalty where a less or no rent is reserved, is only that the tenant or farmer shall pay for his tithes of the same according to the quantity of such rent or rents as the same houses heretofore have letten for, without fraud or covin, before the making of such lease; and to extend the penalty beyond what it is expressed in the act, is quite an unusual thing. For if a law introduces a new thing which was not before, and expresses a fraud and covin, and inflicts a penalty, in such case, by construction, another thing than what is plainly expressed in the act, shall not be said to be a fraud within it; nor shall there be any further penalty added beyond what the statute inflicts. And therefore, in the case at bar, since the ancient rent of 5 l. is reserved, and according to that rate tithes are to be paid to the parson of the parish; the reservation of the fine of 25 l., to be paid annually, shall not be said to be a fraud within the statute, and tithes shall not be paid according to the rate of that fine. And if in *Myght's* case, in 8 Rep. 163. it be resolved, that if tenant *in capite* make a feoffment in fee to his son or wife of two parts of his land, an averment shall not be taken that it was a fraud to cheat the king, because the statute enables him to dispose of two parts; by the same reason, as the ancient rent of 5 l. is reserved in the case at bar, an averment shall not be permitted, that the reservation of the 25 l. was by fraud and covin, because the statute requires no more at the hands of the lessor than the reservation of the accustomed rent. And as it is resolved in *Myght's* case, that if the father and son be joint purchasers to them and their heirs of lands holden *in capite*, an averment shall not be permitted, that this joint purchase was by fraud to deceive the king, because the king's title was not in being at the time of the purchase; so, by the same reason, this increase, by way of fine, being *de novo*, and not *in esse* before, shall not be averred to be by fraud to cheat the parson; and more especially so, because this reservation of 25 l. *per ann.* by way of fine and income may be founded upon good reason; for it may be, that

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the lessor is tenant in tail of his house, and so if he were to make a lease, reserving the rent of 30 l. *per ann.* it would be of this prejudice to him, that he could not afterwards grant a lease reserving a less rent, which might be exceedingly hurtful to him, and therefore he reserves the 25 l. *per ann.* by way of fine and income. Besides, in *London*, men live by trading and merchandizing, and they must of necessity take houses, shops, and warehouses; and if young men were to pay the whole fine in one entire sum, it might be a great hindrance, for which reason, in a lease of such premises, they use to take it by way of annual payment, like a rent. As to the objection, that lands in the country are improved, and so, consequently, are the parson's tithes, and therefore it is reasonable that the tithes of houses in *London* should have a like increase; I answer, 1st. That the tithes of houses in *London* are only a rate tithe; and where there is a *modus decimandi* for lands in the country there is not any increase. 2dly. As lands improve, so there is an increase of houses in *London*, which yield a benefit to the minister. 3dly. Lands yield an increase of their own nature; but houses do not, but require a great charge to maintain them; so that there is no reason that the tithes of houses should increase as those of land do. And the statute of 2 E. 6. discharges barren lands, which require great expence for their manurance, from the payment of tithes for seven years. In the case of *Scudamore* and *Bell*, in the common pleas, *Mich. 3 Jac.* it was adjudged, that there could not be fraud averred for the sum that was reserved by way of fine; for it being a rent only in imagination, and the ancient rent being reserved, it shall never be taken that it was the intent of the statute to extend to it: but, if there had been no rent at all reserved, in respect of the sum in gross to be paid in future, or, if there had been a reservation of a greater rent only for one year; in either of those cases the additional clause of the statute would give relief.

The lord keeper said, that the question rests merely on the body of the act; and that there is no colour to bring the reservation in this case within the clause which speaks of the reservation of no rent, or of a less rent: but the only question is, whether this imitative rent be a rent within the body of the act. He said farther, that there is no question but that the statute extends to the case where a greater rent than the ancient rent is reserved: and he advised the counsel to take into their consideration what authority the lord keeper had upon appeal from the mayor, and in what manner he was to proceed. *Et adjournatur.*

Afterwards,

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Afterwards, in *Easter* term, 16 *Ja.* at the request of sir *Francis Bacon* lord chancellor of *England*, a special commission was granted to the archbishop of *Canterbury*, the lord chancellor, the earl of *Suffolk* lord treasurer of *England*, the earl of *Worcester* keeper of the privy seal, the earl of *Pembroke* lord chamberlain of the household, the bishop of *London*, the bishop of *Ely*, sir *Henry Montague* chief justice of the king's bench, sir *Henry Hobart* chief justice of the common pleas, sir *Julius Cesar* master of the rolls, *Dodderidge* one of the justices of the king's bench, and *Hatton* one of the justices of the common pleas, in which there was a recital of the question depending between *Dunn* of the one part, and *Burrell* and *Goffe* of the other part, and power given to them to hear and determine that cause, and likewise to mediate between the ministers of the churches in *London* and the citizens of *London*, and to make an arbitrary end between them, whereby a competent provision might be made for the ministers, and too heavy a burden might not be imposed upon the citizens, and commanding them to certify to the king what they should do in the premises.

The case therefore was now argued at *York House* by sir *Henry Finch*, one of the king's serjeants, for the plaintiff. Before I go (he said) into the particular question now to be treated of, I will shew in what manner and how tithes and offerings ought to be paid in *London*. As to this, *Lindwood*, in his book *de Decimis*, in the chapter *Sancta Ecclesia*, in his gloss on the word *Negotiationum*, saith, *quod artifices et negotiatores civitatis London ex ordinatione antiquâ in dictâ civitate observatâ tenentur singulis dominicis diebus et in principalibus festis sanctorum apostolorum & aliorum quorum vigiliâ jejuntur offerre pro singulis decem solidis redditus domus quam inhabitant unum quadrantem. Et ordinatio prædicta indifferenter ardeat quoscunque inhabitantes, sive sunt artifices, sive mercatores, sive quivis alii.* This ordinance mentioned by *Lindwood* had reference to a constitution made by *Niger* bishop of *London* in 13 *H. 3.* *A. D.* 1228, which was confirmed in 21 *R. 2.* by *Thomas* then archbishop of *Canterbury*, and afterwards by pope *Innocent* in 5 *H. 4.* And subsequent to that, in 31 *H. 6.* pope *Nicholas* ordained by his bull, that tithes should be paid of houses in *London* as above, a valuation being made of them according to the true and usual value of houses, and the rate according to that proportion amounted to 3 s. 5 d. in the pound for each house; for there were 82 vigils of saints that were fasted, and of *Sundays*. In 36 *H. 6.* there was a composition made between the citizens and clergy of *London*, that a payment should be made by the

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citizens for their houses according to the above rate, and if the houses were kept in the hands of the owner, or if they were leased out without reserving any rent, the churchwardens of the parish where the houses were, should set down a rate of the houses, and according to that rate a payment should be made. In the 14 E. 4. an act of common council in London passed for the confirmation of the bull granted by pope *Nicholas*. But there being afterwards a great variance between the clergy and citizens, they submitted themselves to the award of the lord chancellor and several others of the privy council, who in 1535 made an order that every inhabitant and citizen should pay at the rate of 16d. for every house, and in 27 H. 8. there was a proclamation made for confirming that order; and in the same year, as it appears by the statute of 27 H. 8. c. 15. there was a statute made to ratify the said order, and a proclamation issued as I have mentioned, until an order for the payment of tithes should be made by thirty-two persons to be nominated by his majesty. But no such order being thereupon made, the king making no nomination, and other disputes arising concerning the payment of tithes and offerings, by the statute of 37 H. 8. c. 12. a submission was made to *Thomas Cranmer*, archbishop of *Canterbury*, sir *Thomas Wriothesley* knight, lord chancellor of *England*, *Thomas* duke of *Norfolk*, and several others; and it was enacted, *that such end, order, and direction, as should be made, decreed, and concluded by the aforesaid archbishop, lords, and knights, or any six of them, before the feast day of March next ensuing, of, for, and concerning the payment of tithes, oblations, and other duties within the said city and liberties of the same, and enrolled in the king's high court of chancery of record, should stand, remain, and be as an act of parliament, and should bind as well all citizens and inhabitants of the said city and liberties for the time being, as the said parsons, vicars, &c. according to the effect, purport, and intent of the said order and decree so to be made and enrolled.* In consequence of which an order was afterwards made by all the commissioners, except the duke of *Norfolk* and sir *Richard Lyfster* knight, chief justice of *England*, that the citizens and inhabitants of *London* should pay at the rate of 2 s. 9 d. for every pound of rent that was paid for the houses. And upon two branches in this order or decree the present question arises. The first of these branches is, *that the citizens and inhabitants of the said city, &c. shall yearly without fraud or force for ever pay their tithes to the parsons, &c. after the rate hereafter following, (that is to wit), of every 10 s. rent by the year 16½ d. and of 20 s. rent 2 s. 9 d.* The second branch is. *And where any lease shall be made of any dwelling-house, &c. by fraud or covin, reserving less*

less rent than hath been accustomed or is, or that any lease shall be made without reserving any rent upon the same by reason of any fine or income paid beforehand, or by any fraud or covin, that then in every such case the tenant or farmer, &c. shall pay for his or their tithes according to the quantity of such rent or rents, &c. as the same were last letten for without fraud or covin before the making of such lease. The only question then in this case will be, whether there shall be 2s. 9d. in the pound paid according to the rate of 5l. or according to the rate of 25l. *per annum*, which is reserved annually by way of income. And this question, though in this particular it is of no great moment, because it is but for a trivial sum beyond what is paid, yet in its consequence it is of very great importance, so that it may not only be said that it is *magnum in parvo*, but that it is *maximum in minimo*, and the cause may be termed a maiden cause, there having been none of this nature before; and it comes properly under the meridian of the court of chancery, the chancellor being the proper judge of it, and the person to whom it is principally referred. And I am of opinion that judgement ought to be given for the plaintiff; for I conceive that this rent of 25l. *per annum*, which is reserved by way of fine and income, is a rent properly and truly within the words and letter of the decree. For 1st. the etymology and genuine propriety of the word *rent* shews that it is so. 2d. It is so in common acceptation and according to the popular use of the word. 3d. It is a rent in the judgement and eye of the law. 4th. It is a rent in the understanding of the spiritual and ecclesiastical law; so that being a rent all these four ways, it would be hard that it should not be a rent within the words of the decree.—As to the 1st. in Latin a rent is called *redditus*, *ita dictus a redeundo sive a reddendo*, inasmuch as all profits of what kind soever that come in annually, may be properly termed a rent, according to the opinion of Lindwood 64. in his chapter *Quoniam autem*, and gloss on the word *redditus*. For he says, *quod vocabuli redditus significatione intelligitur omnis fructus, et est generalis ad omnem utilitatem*. If so, then this rent of 25l. *per annum* reserved by way of income, cannot but be called a rent.—As to the 2d. its being a rent in common acceptation, I say, that words are of the same nature as coin is; and as coin must be received according to its current value, so words must be taken in their current sense; and so it is said, *communis usus loquendi praevalet communi significatione verborum*. And therefore in 34 E. 3. 24. it appears that a remainder limited to Richard the son of Richard Marwood is good, notwithstanding he be a bastard, and

1617. and so in law *nullius filius*, because in common reputation and understanding he is known by that description. So in *sir Myle Finch's case*, 6 Rep. 65. where a fine was levied with an exception of the manor of *Bramstone*, it was holden, that notwithstanding there was no such manor *re verâ*, yet as there was such a manor in common reputation the exception was good enough. So in *Carter's case* in 25 Eliz. it was ruled on the statute of 1 H. 5. c. 5. that an addition by which a man is commonly known is a sufficient addition, though it be not his true addition, and therefore the addition of gentleman in the indictment was good, notwithstanding the party was in fact a yeoman; in the case at bar therefore the 25 l. *per annum* being a rent in common acceptation (for if *Goffe* were asked what rent he paid, he would answer 25 l. *per annum*) it shall be a rent within the words of the decree.—As to the 3d. viz. the judgement of law of this rent, I insist that, notwithstanding the rent in the case at bar is not any one of the three rents mentioned by *Littleton* in his chapter upon rents, yet that is no argument that it is not a rent in judgement of law: for there are many annual sums which the law calls a rent, and yet they are not any one of the three rents mentioned in *Littleton*: and therefore in the *Register* 158. and 159. you will see that the writ calls every annuity a rent; for it is said in the writ, *præcipimus tibi quod justiciæ A. quod justis, &c. reddat B. centum marcas, decem quarteria frumenti et viginti robas, quæ ei a retro sunt de anno redditu centum solidorum duorum quarteriorum frumenti, &c.* and F. N. B. 152 A. calls an annuity issuing out of the coffers of another, or to receive from his person, a rent; and 9 H. 6. 12. & 53. an annuity granted by the queen *percipiendum de quâdam summâ assignatâ in partem dñis ipsius reginæ de magnâ custumâ London*, is called a rent; and in 1 H. 6. where a lease for years was made of certain sheep, rendering yearly for every sheep 4d. that sum so reserved was called a rent. And it is such a thing that in debt brought for it, the defendant might wage his law. And in 30 Aff. pl. 5. where a lease is made of an advowson or of the toll of a mill rendering rent, this is called a rent; and yet it is not a rent out of any thing manurable, as *Littleton's* rents are; and for such a rent the king may distrain according to 14 E. 3. and 5 Rep. 4. *lord Mountjoy's case*. In the case at bar, therefore, there can be no reason but that the rent of 25 l. *per annum* reserved by way of fine and income should be a rent. As to what may be objected, that the before mentioned rents should not be any rents within the statutes of 32 H. 8. c. 28. 1 Eliz. c. 19,

13 *Eliz. c. 10.* and therefore shall not be rents within the ordinance and decree in the case at bar, they are not to be compared together. For statutes are to be interpreted *secundum subjectam materiam*, and therefore those statutes aiming only at the benefit of the issue in tail or successor of the bishop, &c. are to be intended to relate only to such rents as are incident to the reversion, and so may go to the issue in tail or the successor of the bishop. But there is no such respect to be had in this decree; for it is all one to the parson and his successors, whether it be a rent, an annuity, or any thing else. As to the 4th point, *viz.* the understanding of the spiritual and ecclesiastical law, it appears by *Lindwood* in his chapter *De officio vicarii*, that *Stephen* archbishop of *Canterbury* in his constitutions directs, *quod ad minus redditus quinque marcarum assignetur vicario perpetuo*, and in his chapter *De rebus ecclesiæ non temerandis*, where there is an ordinance *quod clericus inferior possessiones vel redditus dignitatis vel ecclesiæ sibi commissæ consanguineis vel amicis suis, &c. alienare non præsumat*, that the ecclesiastical law considered such annual pension reserved by way of income to be as a rent; and it being a rent in their law, the judges who are wont to consult with all manner of professions where there arises any difficulty as to those things which are properly known to other professions (as in 9 *H. 7. 16. pl. 8.* where there was a consultation with grammarians about the meaning of *puri auri*; in 11 *H. 7.* where there was a consultation about the validity of a union) will of course give judgement according to their law; and if they do, then they must adjudge this rent of 25 *l. per annum* to be a rent within the words of the decree. And here I cannot but take occasion to commend the nobleness of our law, which, though it is the *primum mobile* that attracts all the planets, yet applies itself to all other professions, and becomes all things to all men, that it may do justice to all; and therefore in matters which belong to grammarians to discuss, it gives judgement according to the opinion of grammarians, as in the case before cited, and with respect to the meaning of the word *puero* in *Dy. 337 a.*: and where the matter is of a spiritual nature, and it belongs to the spiritual judges to discuss it, it gives judgement according to the spiritual law; and therefore in *Cawdrey's* case, 5 *Rep.* an allowance was made to the pleading of a sentence in the ecclesiastical court according to the form there prescribed: and where the thing is customary and concerns a custom, it gives judgement according to the custom; and therefore in 24 *E. 3. 14.* where an action of accompt was brought by an heir in gavelkind when he was only 15 years of age, it was holden, that

1617. an action brought at such an age was well enough, inasmuch as it was the full age of an heir in gavelkind according to the custom; and yet by *F. N. B.* and *Littleton*, the age of an heir at common law upon the statute of *Marlbridge* at which he may bring an action of accout is not until he attains the full age of 21 years; and so, where an administration of the goods and chattels of an intestate is committed according to the statute of 31 E. 3. c. 11. the administrator shall have a discharge avoiding an obligation, and other such things; and yet they would not pass under the general words of goods and chattels: but rather than that the law will fail of giving remedy, it will apply particular words to general things. And for that reason in 8 H. 6. 34. *Br. Lease, pl. 71.* where the king made a lease by these words *committimus tibi take terras, &c.* it was holden to be a good lease, and the law remitted somewhat of the strictness of the words to apply them to the ancient usage of the exchequer. In the case at bar, therefore, the law will apply this 25 l. *per annum* so annually reserved to a rent, and will construe it to be a rent, in order that the parson may receive what is due to him under the decree. But 2dly, admitting that the 25 l. *per annum* were not a rent within the words and letter of the decree, yet it is a rent within the intent and meaning of it. And the decree may be taken by equity, 1. because it was *pro bono ecclesie*, and so concerns our God, and for that reason a liberal construction is to be made of it. 2. Because it conduces to the maintenance of religion, *et summa ratio quæ pro religione facit.* 3. Because it tends to the avoiding of fraud which here stares in our face, and it is the *Cacus* to conquer which is one of the labours of *Hercules*: and if penal laws, which trench upon the estate or life of a man, shall be taken by equity, as we find by *Littleton* § 67. who holds that an action of waste upon the statute of *Gloucester, c. 7.* may be well maintained against one who is tenant for half a year, notwithstanding that the statute only speaks *de dimissione ad terminum annorum*; and by *Plowden* 467. who is of opinion, upon the statute of 1 E. 6. c. 12. that clergy shall be taken away from a man who steals a *horse*, notwithstanding the statute only speaks of those who steal *horses* in the plural number; then *a fortiori* shall this decree, which is *pro bono ecclesie*, and tends to the maintenance of religion and the suppression of fraud, be taken by equity. And therefore it seems that if the rent of a robe, or of quarters of corn or grain, be reserved upon houses in *London*, and there are such rents, as we have seen above from *F. N. B.*
and

and the *Register*, the parson shall have tithes of such rents according to the value of those things, and yet they are not within the words of a rent of a sum certain. And if the lessee by the same indenture by which the lease is granted, covenants to pay 10 l. *per annum* to the lessor for a house in *London*, this is a rent within the intent of the decree, so that the parson shall have tithes of it. 4. The consideration which is decreed is not by way of amplification for the increase of the parson's revenues, but rather by way of diminution; for whilst the ordinance of *Niger* bishop of *London*, the pope's bull, and the constitution made by the common council, allow 3 s. 6 d. in the pound annually, now this decree gives only 2 s. 9 d. in the pound *per annum*, and is an argument that the decree should be taken by equity. Besides, this decree not enacting any thing new, but only making a provision that whereas such offerings and at such time were paid for houses in *London*, there should be now such a sum according to such a rate paid at such a time, it is reasonable that a liberal construction should be given to it. And as to the objection, that the constitutions of the bishop of *London*, the pope's bulls, or the acts of the common council, cannot impose any charge upon the inheritances of men, I will not maintain that they have any such power; but I say that, before any of those ordinances were made or papal bulls granted, there was by the custom of *London* such a duty due out of the houses in *London* to the parsons, as it appears by *Dr. Grant's* case, 11 *Rep.* where it is holden, that a suit may be maintained in the spiritual court for those duties. And the original instrument of *Niger's* ordinance and the pope's bulls shew as much: for it is said that the citizens of *London* shall pay such rates *prout etiam eatenus longè retroactis temporibus et tempore præscriptibili per parochianos ecclesiarum dictæ civitatis consuetum extiterat*. 5. It appears by the ordinances that the rates shall be paid *prout domus et hospitia locabantur, sive locari poterant, secundum veram æstimationem*: the ordinances of ancient time therefore being so, and there being now an alteration in the manner of the rates, it is reasonable that this decree should be expounded according to the ancient ordinances; and that as the reservation of 25 l. *per annum* by way of fine and income tends only to defraud the parson of his tithes, according to a due proportion, and would have been a fraud cursed with *bell, book, and candle* in ancient times, and as it shews that the house is of such a value to be leased, and would have been leased at that value, according to that rate then should the tithes be now paid. 6. As the decree has by an equity been

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been interpreted for the disadvantage of the parson, by the same reason should it be expounded by an equity for his benefit and advantage; and therefore, in 21 *Eliz.* in the king's bench it was adjudged, that where the owner of a house in *London* paid a rent to the king which was given to him by the statute of 1 *E. 6. c. 14.* made against superstitious uses, he should only pay tithes according to the value of the house beyond that rent, and not according to the true value: and the law should be the same, where he paid a quit rent or rent charge to another out of the house, for it is not reasonable that he should pay tithes according to the true value out of the house, and yet should be chargeable farther with a rent to another person. So then in the case at bar, since the owner has a benefit upon the reservation of the 25 l. *per annum* by way of income, it is reasonable that the parson should be respected according to that benefit which arises to the owner. As to the objection, that here is not any fraud at the common law, nor fraud within the meaning of this decree, because the rent in which the fraud is supposed to be committed, and the person against whom it is intended were not *in esse* at the time, I deny the ground of it, because it is repugnant to several acts of parliament: for it appears by the statute of *Marlbridge, c. 6.* that where the tenant enfeoffed his first-born son or a stranger by collusion to defeat the lord of his wardship, it was fraud at the common law, and it is also fraud by that statute; and yet the lord against whom the fraud was committed had no present right. So, where one, pending an action against him, makes a feoffment to his friends to the intent to hinder execution from being had against him of his lands; this is fraud by the common law according to 13 *Eliz. Dy. 294.* and it is also declared to be so by the statute of 27 *Eliz. c. 4.* and yet the judgment which made the land chargeable was not in being when the feoffment was made. And I am of opinion, that if there be a sale of lands without any consideration, and afterwards the grantor become indebted to the king, such lands will be liable to the king's debt. As to what has been put on the 34 *E. 1. Garranty 88.* that if before any purchase of the lands in tail the tenant in fee make a feoffment of his lands, and afterwards purchase lands in tail and make a feoffment with warranty, there is no fraud at all in that, and therefore it is not to be resembled to other cases where there is fraud. And as to the objection which has been made, that the second branch of the decree shews that here has not been any fraud, inasmuch as the rent which was of ancient time

reserved is here paid, and the second branch aims at no more than this, because where the ancient rent is not reserved upon a lease, or there is no rent at all reserved, the penalty is only to pay tithes according to the proportion of the ancient reservation, I answer, that there has been a greater rent in time past than there is now: for there has been a reservation before in the same manner as the reservation is now made; so that notwithstanding *Burrell* has hoped to deceive the church by this fraudulent reservation by way of income, yet there being fraud in the intention and purpose, and fraud in the execution, *non ita effugiet, et fallere fallentem non est fraus*, and by reason of the preceding reservation he shall be forced to pay tithes according to the rate of it.

An argument that tithes should be paid according to the rate of the reservation by way of fine and income may be well enough drawn *a convenienti*. For justice being the rule of conveniency, and the law being the rule of justice, if the law be that tithes shall be paid according to that proportion, then it cannot be denied but that it is also convenient. And that the law is so, is manifest, 1st. from human provisions, that is, the common and statute law, of which as I have made mention before, I shall not insist upon them now. 2. It is *jus divinum*; for though the canonists differ upon the question, whether *decima pars* be due *jure divino*; yet they all agree that there is a convenient portion due for the maintenance of the minister: whence it follows that this proportion of 2s. 9d. in the pound being manifestly a convenient portion for the maintenance of the minister, the subtraction of it is *contra jus divinum*. 3. The law of the custom of the city says, that a payment ought to be made according to the reservation of rent, as we see by *Dr. Grant's case*, 11 *Rep. et consuetudo ex rationabili causâ usitata privat communem legem*, be it the *jus scriptum*, or the *jus non scriptum*. 4. The law of the *consulta prudentum* has directed the payment of tithes for houses in *London* to be made in this manner; as *Niger* bishop of *London* in the time of *H. 3.* pope *Innocent* in the time of *H. 4.* pope *Nicholas* in the time of *H. 6.* the order, decree, proclamation, and statute, in the time of *H. 8.* which payment therefore ought to be now continued accordingly, not fraudulently subtracted contrary to law and justice. 5. The law, from the danger to which the ministers of *London* expose themselves more than other ministers of the country do, requires the payment of tithes at the hands of their parishioners according to the due proportion allotted to them. For they are bound to be resident, and to give comfort to their flock, in the time of the plague,

1617. plague, when their bodies are subject to the danger of infection, their minds to fear, and their souls to sorrow; so that being in greater danger than other ministers are, they ought to have a greater reward than others have. There are many other conveniencies which I will not now insist upon, because in speaking of them at this time and in this place, I should be like a *Phormio* teaching the precepts of war to an expert *Hannibal*. And as to the objections which have been made, that if tithes were to be paid *secundum veram estimationem*, every parish would be as great in value as a bishoprick, I answer 1. that this parish of *Gracechurch*, being a parish consisting of very few families, is not in any danger of that abundance. 2. The value will not be proportionally greater now, than it was before the making of the statute of 37 *H. 8.* at which time there was a greater sum paid. 3. Where the parishes are so large, there is a means afforded of associating other learned men to them, and of endowing vicarages. And as to the objection that houses are for expence and hospitality, and therefore not to be resembled to land, I answer, 1. that that objection might have been made before the statute, and there is no better ground for it now than there was then. 2. The statutes of 27 *H. 8.* & 37 *H. 8.* do not conceive any deduction to be necessary for the repair of houses, as the 1 *E. 6.* does for barren ground, and therefore they made no provision for it, nor are we to make any. 3. The law favours agriculture more than houses, the one being more beneficial to the commonwealth than the other.

In the following term, viz. *Tr. 16 Ja.* the case was argued in the same place by sir *Tho. Coventry*, the king's solicitor, for the defendant. He said, I shall consider 1. how the case stood before the decree. 2. I shall consider the several parts of the decree. As to the 1st. point, before the decree and the act of parliament, there were not any tithes due by the course of the common law of houses in *London*. 1. In regard that tithes are only due of such things as yield an increase, of which nature houses are not; for they rather decrease, than increase, inasmuch as they require reparations. 2. Tithes are due out of the profits and revenue of things, and do not charge the inheritance; and it is for that reason, that they are determinable in the ecclesiastical court; for if they charged the inheritance, then they would be determinable at common law: but of houses there is no profit or revenue, and therefore tithes cannot be due of them. 3. Tithes are things collateral to the land, and not issuing out of the land, and therefore, according to 42 *E. 3.* 13. & 30 *H. 8. Dy.* the parson shall have tithes of land contrary to his own

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Own feoffment or lease; and in 7 E. 6. Dy. in an assise for a portion of tithes, it appears that it is not necessary to name the tenant. But, if tithes were to be paid of houses, then they would issue out of houses, which is contrary to the rules of law. 4. It has been often adjudged that houses are discharged from the payment of tithes by the common law without a special custom; and for that reason, in 39 & 40. Eliz. in the common pleas, between *Dalison* and *Romer*, it was adjudged that tithes were not due of houses, and with that accord the resolution in *Dr. Grant's* case, and the case of *Dr. Leyfield*, in the 12th of *James* in the common pleas. 2. Notwithstanding tithes were neither paid nor due for houses in *London*, yet from the beginning the ministers of *London* had a competent provision made for them by glebe which was given to them, oblations, obventions, and other casual duties, which arose upon marriages, christenings, burials, and such other things, as it appears by 30 E. 3. & 38 E. 3. 13.; and by the records in *London* it appears that the offerings for houses in *London* were paid in this manner: for he who paid 20 s. rent, on every *Sunday* or every apostle's day, the vigil of which was a fast, paid a halfpenny; or, if he paid but 10 s. rent, he was to pay only a farthing; which amounted at the most but to 2 s. 6 d. in the pound; and sometimes indeed it was less, as, when one of the apostles' days fell upon a *Sunday*, for then there was only one halfpenny or farthing paid for both. And this manner of payment rather decreasing, it was established by a constitution of *Roger Niger* bishop of *London*; and it so continued without any alteration 'till the 13 R. 2. when *Thomas Arundel* archbishop of *Canterbury* made an explanation of the constitution, and obtruded upon the citizens of *London* twenty-two days more than were usual, which raised the sum to 3 s. 6 d. in the pound. And this explanation was confirmed by pope *Innocent* in 5 H. 4. and afterwards by pope *Nicholas* in 30 H. 6. But there was a constant struggle on the part of the citizens against this explanation, and the records of *Guildhall* in 32 H. 6. state this order of explanation to be *destructorius* rather than *declaratorius*, and to be obtained *surr:ptivè et abruptivè* without summoning the citizens, and without any assent to it on their part; and thereupon there was after that time a perpetual agitation between the ministers and citizens of *London* in the court of *Rome* and in the ecclesiastical courts about the payment of those offerings, until at length it was settled by the decree made in 27 H. 8. when it was established according to the purport of the decree. And upon the several parts of this decree arise the two

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questions which have been made and argued on the other side: the first of which is, whether, as the 25 l. were reserved by way of fine and income payable during the term at the same days and feasts as the rent of 5 l. is payable, whether tithes shall be paid according to the rate of 5 l. only, or according to the rate of 30 l. and if the 25 l. shall be said to be a rent? 2. Whether the reservation of this 25 l. *per ann.* by way of fine and income shall be said to be a fraud to evade the statute? as to the first question, I say that this 25 l. which is reserved by way of fine and income cannot be said to be any rent of the houses; for according to *Littleton* there are only three rents, namely, a rent-service, a rent-charge, and a rent-secck; and this fine and income cannot be said to be any of those three rents, whence it follows that it is not a rent, *et argumentum a divisione fortissimum*. 2. This fine and income has none of the qualities and properties of a rent; for 1. There is no distress incident to it: 2. Upon an eviction of the house there will be no discharge of this fine. 3. There will not be any apportionment of this fine upon an eviction or grant of part of the house. 4. Upon an entry or seoffment over of the house there will not be any extinguishment or suspension of the fine. 5. This fine or income is not incident to the reversion, nor will it pass with it. 6. It shall not be said to be a rent either in respect of the lessor, or in respect of the lessee: for, in respect of the lessor, it is a *chose in action* which cannot be granted over, and which will go to the executor, and will not descend to the heir; and in respect of the lessee, it will not bind as a rent will do; and for that reason, in the book of 45 E. 3. 11. if a lease be made to baron and feme with such a reservation of a fine as in the case at bar, it will not bind the feme, notwithstanding that she agreed to the lease, as another rent would do; and 10 Eliz. Dy. 275. in the lord *Darcy's* case, it was resolved, that where such a reservation was made as in the case at bar, the king should not have the rent, nor could relief be given upon the ground of fraud.

As to what has been objected, that the fine in the case at bar shall be said to be a rent for five reasons, 1st. from the etymology; 2. from the common appellation; 3. the judgement of the common law; 4. the judgement of the ecclesiastical law which is to be regarded in a case of tithes; 5. from the intention of the decree; I answer, that as to the etymology, which is a *reddendo vel redeundo* in which *omnis fructus* is comprehended, that it is not sufficient to draw it within the general word of a rent; but it must be a rent of houses, according to the words of the decree and *Niger's* constitution,

stitution, which call it *pensio domus*, and *Lindwood*, who calls it *pensio quæ provenit ex domo*: and this fine and income cannot be said to be a rent of a house, nor to be recoverable from it, because this fine charges only the person, whereas a rent of a house charges the house, and the person is only charged in respect of the house; and therefore, notwithstanding the house be burnt and consumed, or the lease thereof utterly avoided, yet shall the lessee pay this fine, for his person is bound in respect of the collateral covenant, and the rent neither issues, nor is it rendered, out of the house. Then as to the 2d. point, viz. common appellation, this is not a rent even in that sense: for the *Londoners* take notice of this as a fine and income, and call it so, and not a rent: but, admitting that this fine were a rent in common appellation, that is no argument to make it a rent within the interpretation of a statute, which requires a legal interpretation, and not a vulgar appellation, according to the case of 13 & 14 *Eliz. Dy. 296 b.* where it is adjudged, that a bastard shall not be a child advanced within the statute of 32 *H. 8. c. 1.* and yet according to 39 *E. 3.* he is a son in common appellation, for he is *filius nature*. And if a parson or other ecclesiastical person covenant that another shall enjoy his land for so many years; notwithstanding this is a lease in common appellation, yet it is not a lease within the statute of 13 *Eliz. c. 13.* so as to be avoided; for the statute of 14 *Eliz.* was made on purpose to avoid such sort of covenants. Besides, the statute of 37 *H. 8.* being penned by grave and learned men who are named in the statute and decree, it is not requisite that an interpretation be made according to vulgar appellation, they being sufficiently conversant what phrases to use. But, admitting that an interpretation were allowable of a rent according to common appellation, yet this fine is not a rent within the compass of the decree, because this manner of reservation by way of fine and income was not in use before the making of the decree and statute of 27 *H. 8.* and not being a rent in common appellation at that time, it cannot be drawn within the statute at this day notwithstanding that it be now a rent in common appellation: and *Carter's* case, in 25 *Eliz.* does not make against this, because that statute was made on purpose to be applied to a vulgar appellation. As to the 3d cause, viz. the judgement of the common law, notwithstanding that the lessor in his reservation of it calls it a rent where it is reserved out of a mill, out of an advowson, or out of goods, yet in judgement of law it is only an annual payment, and not a rent; and so the judgement of law is that it is not a rent, as

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we see by 1 H. 6. 9 H. 6. whatsoever the reservation of the party may be. It is to be observed too that 11 H. 4. & 7. N. B. call it *annuus redditus*, and not by the name of *quatuor libratas redditus*, which is that by which a rent is demanded, as we see by the books before cited; and therefore the books which are produced to prove an annuity to be a rent in judgement of law, strongly prove the contrary. For 1. a rent is not demanded by the name of *annui redditus*, but of *quatuor libratarum redditus*: 2. The warrant of attorney in a writ of annuity is in a plea of *debt*; whereas in a precept for rent it is in a plea of *land*, according to 11 H. 4. which shews that *annuus redditus* and a rent are different. 3. It is not sufficient to prove it a rent in judgement of law, without proving it to be a rent out of a house; and of that nature this fine and income is not; because it is a *chose in action* which charges the person, like an annuity, and is not grantable over; and if an annuity be granted to pay out of a person's coffers, the grantee must resort to the person of the grantor to charge him in a writ of annuity, and cannot go to the coffers to take the annuity out of them. As to the 4th point, viz. the judgement of the ecclesiastical law, it is not material in the case at bar what that may be; for a construction is not to be made in this case of canons of the church or any other part of ecclesiastical law, where their exposition and judgement are to be received, and credit is to be given to them; but an exposition is to be made of an act of parliament, which is part of the temporal law; and such exposition must be according to the temporal law, notwithstanding that it concern ecclesiastical things. And for this reason it appears by 7 Eliz. Dy. 237. 8 Eliz. Dy. 255. 4 Rep. Holland's case, that the statute of 21 H. 8. is expounded to make an avoidance without any declaratory sentence, according to the common law, notwithstanding it concerns an ecclesiastical person. The same exposition is also made of the statute of 13 Eliz. c. 12. for not reading the articles, as we may see by 23 Eliz. Dy. 377. & 30 Eliz. Morris and Eaton's case, and yet it concerns both an ecclesiastical thing, and an ecclesiastical person. It is to be observed too, that the act of parliament makes the lord mayor of London and the lord chancellor of England the expositors of this statute, for which reason an exposition is to be made according to the common law, and not according to the judgement of the ecclesiastical law; and prohibitions have been often granted where a libel has been exhibited in the ecclesiastical court for the tithes of rent of houses in London, as was done in the case of Price and Watts, 34 Eliz. B. R. & M. 5 Ja. in the case of

Scudamore and Bell, in *C. B.* and in the case of *Dr. Prouse*, *Tr.* 15 *Ja.* which shews, that the judges of the ecclesiastical law are not judges in this case, but that judgement is to be given according to the rule of the common law. Here are no *Latin* words for the grammarians, nor civil law terms for the civilians to give their exposition of: but here is a plain *English* statute, of which a construction is to be made according to the rules of the common law. And it hath been often adjudged upon the statute of 31 *E. 3. c. 11.* which warrants the granting of administration of the goods of an intestate, that a lease for years is *bona* within that statute: and in 7 *H. 4. 6.* it is ruled upon the statute of 4 *E. 3. c. 7.* which gives trespass *de bonis asportatis in vita testatoris*, that executors may have an *ejectione firmæ* upon an ejection in the life of the testator; and so they may have a ravishment of ward according to 11 *H. 4. 55.* As to the fifth point, *viz.* the intent of the decree, I insist, that this fine and income of 25 l. *per ann.* is not a rent within the intent of the decree. For when an act of parliament speaks of a rent, it must be intended to be such a rent as is properly a rent; as, where an act of parliament makes mention of escuage, it is to be understood of that which is properly escuage, which is escuage uncertain. Besides, every rent is not within the compass of the decree; and therefore if the rent be not of a certain value, as, if the rent reserved be a spur or a horse, &c. without the addition of any value, it is not a rent within the statute, not being of any certain value. So, it must be a yearly rent; for which reason if it be a rent of that kind upon which an action of debt does not lie till the last day, as in *Walker's* case, 3 *Rep.* 22. & *F. N. B.* 130 *H.* and in the case at bar, it is not a rent within the intent of the decree. It appears by an examination of the several branches of the decree, that the rent which the decree has in contemplation, is such a rent as is properly a rent, and arises upon a reservation, and issues out of the houses: for the first of those clauses is, *where any lease, &c. shall be made of any house reserving less rent than hath been paid, &c.* the second is, *where any person shall demise any dye-house or brew-house, or the like, reserving a rent, &c.*: the third clause is concerning the payment of tithes according to the rates of those several rents reserved; so that if there be not a rent reserved and issuing out of the houses, (and the fine and income in the case at bar is not such), then it is not within the intention of this decree. But farther, the decree has a clause for an abatement of the rent in case where the house is burnt; and this income is not within that clause, because it shall be paid

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notwithstanding any such casualty, and there is no need of any new reservation. And by a clause in the decree, assignees are chargeable according to a proportion with the rent, and there cannot be any apportionment of this fine and income, and therefore it is not within the intention of the decree. Nor is it the intention of this decree to take up the rack rent, for that is contrary to the intent of all the other acts, as 31 H. 8. c. 12. 37 H. 8. c. 12. 1 E. 6. c. 13 Eliz. c. 10. which only aim at the reservation of the ancient rent; and if the makers of the decree had aimed at the value of the houses, they might have said a rate to be paid according to the value of the houses, and not according to the reservation of the rent. And if tithes should be paid for this fine and income, there might be a payment beyond the value of the house; for the lessee is bound to pay this income whatever may become of the house; and therefore it is possible, that the house might be forfeited, or there might be an eviction, or a new lease might be granted of it; and then tithes would be paid for it according to this income, and also according to the proportion of rent newly reserved, which is contrary to the intention. It never could be the intention of the decree to oppress young tradesmen, and if the law should incline to this exposition, that tithes should be paid according to the proportion of this income, they would be oppressed; for either they must pay great sums immediately, which they are not able to do; or beyond their fines and incomes which they pay annually, they must pay an eighth part more for tithes, which would be exceedingly mischievous. Besides, it would be very inconvenient to force men to lease their houses at a rack rent, as suppose they should be tenants in tail, &c. for after they have once raised the rent, they cannot lower it when they will. And as to the objection, that this construction to pay tithes according to the proportion of income is *pro bono ecclesie*, and therefore is to be extended as far as it can be, I answer, in the first place, that it is observable, that this decree is made in enlargement and amplification of what was paid to the ministers before, and not by way of diminution; for whereas only 2 s. 6 d. was due before the decree, now by the decree it is at the rate of 2 s. 9 d. in the pound. 2. This rate of 2 s. 9 d. in the pound being more than is allowable either *jure divino*, by the common law, or by custom, (for those laws allow only a tenth part, whereas this is an eighth part), it is not reasonable to extend it farther than the words import. 3. There being an imposition of the payment of tithes upon several things, as dye-houses, brew-houses,

houses, stables, gardens, &c. upon which there was not any imposition before, it was consistent with reason only to give an allowance of payment of tithes according to the rate of what is properly a rent, and not according to the rate of the fine or income; and the more especially so, because the ancient constitution was that tithes should be paid at the rate *prout domus locabantur*, and not *prout locari poterunt*. 4. The decree imposes fine and imprisonment upon those who do not pay their tithes, and therefore it is to be *stricti juris*, as we see by Dr. Bonham's case in 8 Rep.

As to the second question, which is, whether this reservation of 25 l. *per ann.* by way of fine and income, be a fraud or not, I say, 1st. that it cannot be a fraud upon the rules of the common law, because the person against whom the fraud is supposed to be committed had no interest at all in the 25 l. *per ann.*, in the reservation of which the fraud is supposed to consist. For there was only 25 l. *per ann.* anciently reserved, and he who shall have remedy against fraud at common law, must have a precedent interest according to the cases of 22 Aff. pl. 72. 43 E. 3. 2. 48 E. 3. 12. 8 E. 2. Affise 396. 3 Rep. 83. Upton and Bassett's case; in all which cases there was a precedent interest in the person supposed to be defrauded; and for that reason he had remedy at the common law. But, if there were no such precedent interest, then there was not any remedy given; as, where a villein alienated his goods by fraud, the lord had no remedy for them, because his interest commenced only upon the claim or the seizure. And upon 17 E. 3. 54. and 3 E. 3. Collusion 29. where the tenant alienated by collusion, the lord had no remedy before the statute of Marlbridge; because he had no interest precedent to the alienation. And before the statute of 3 Ja. c. 5. if a recusant had purchased lands in the name of another person, the king had no remedy for those lands, because he had no precedent interest. So, in Myght's case, in 8 Rep. where the father and son are joint purchasers of lands holden *in capite*, there is no remedy for the king. And I conceive that this reservation is not a fraud, nor material; inasmuch as the fraud, if it be a fraud, rests in non-feasance, *viz.* in the non-reservation of rent out of the house; and the common law extends only to a fraud which consists of a misfeasance, and not to one which consists of a non-feasance; and therefore where a usurpation was had upon an infant or feme-covert by fraud, there was no remedy before the statute of West. 2. c. 5. it being a fraud that consists of non-feasance. And the reservation of 25 l. *per ann.* by way of fine and income, can-

1617. not be worse than it would be if there were no such reservation; and if only the 5 l. *per ann.* had been reserved, without reserving the income, it had been well enough, because the ancient rent was reserved, and the law requires no more. I conceive that this can be no fraud upon the decree itself; for the decree only extends to cases where either no rent is reserved, or there is less than the ancient rent reserved; and there is no provision to compel the reservation of a greater rent. 2. The fraud and covin mentioned in the statute goes to the payment, and not to the reservation; and here being a payment of tithes according to the rent of 5 l. *per ann.* which was the ancient rent, the statute will not extend to it. 3. Upon the decree itself, if *Burrell* had not made any reservation of rent at all, he would have paid only after the rate of 5 l. *per ann.*; he shall not therefore be now in a worse plight than if he had not reserved any rent at all: which being so, it is a very strong argument that tithes should be paid only after the rate of 5 l. *per ann.* and not according to the rate of the income, and the reservation of the income should not be said to be fraudulent, and to be made by fraud in order to evade the statute. As to what has been objected of the conveniency of having tithes paid according to the proportion of the income, I admit that the rule of justice is the rule of conveniency, and that what is just is convenient; and if the law be as I have argued it is, then, upon the rule of justice, tithes ought not to be paid after the rate of 30 l. *per ann.* but only at the rate of 5 l. *per ann.*: and the statute of 37 H. 8. c. 12. is as well a restriction upon the parsons that they shall not demand more than 2 s. 9 d. in the pound, as it is an obligation upon the citizens that they shall pay according to that proportion. And as to the argument which has been drawn from the divine right, that can be of no avail in the case at bar, because the 2 s. 9 d. in the pound, being more than the tenth part, is more than can be demanded by the law of God. And as to the argument which has been drawn *a consensu civitatum et sapientum*, neither of those will warrant the opinion of the payment of tithes according to the rate of the fine and income, but the contrary. And as to the argument which has been drawn *a convenientiâ rei*, if we are to be determined by this, it could never be the intent to require a payment of a greater proportion than according to the ancient rent; for it would be inconvenient, 1st. to compel men to lease their houses at rack rents: 2dly. it would be a great imposition upon those beginners who are unable to give fines *in pecuniis numeratis*: 3dly. it would be

be a discouragement to laying out any money upon their houses, since their charge would be raised according to the money laid out: 4thly. it would be the disturbance of a settled opinion, which hath been holden time whereof the memory of man runneth not to the contrary: 5thly. the *London* benefices would be greater than many bishopricks in *England*. And in *M. 5 Ya. in C. B.* where *Scudamore* and *Eire* were plaintiffs in prohibition against *Bell* parson of *Queenhithe*, it was resolved, that there could be no suit in the ecclesiastical court for tithes of houses in *London*, because the statute had appointed other persons to be judges in that case. 2dly. It was agreed, that no tithes could be demanded of those houses which were built subsequent to the making of the decree, because the statute extends only to those houses which paid tithes before. 3dly. It was resolved, that a greater proportion could not be demanded of houses in *London* than according to the ancient reservation, and that no respect was to be had to fine and income (a).

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2 Inst. 659.

It was agreed by the lord chancellor and the other assistants, 1st. That the 25 l. *per ann.* reserved by way of fine and income, was not a rent. 2dly. It was ordered, that the records which had been cited, should be produced. For if the rate paid of ancient time was only 2 s. 6 d. and so the decree went in amplification of the ancient proportion, then it was of some moment, *Niger's* constitution being *ex antiquâ consuetudine et tempore præscriptibili*. 3dly. The record in the 32 *H. 6. c.* was a record made by the citizens themselves, and therefore not of so great authority.

(a) In the case of *Meadhouse* and *Taylor*, *B. R. Hil. 5 Ya. Noy* 130. it was holden in a prohibition to a suit in the spiritual court, for tithes of rent in *London*, that by 37 *H. 8. c. 12.* the suit ought to be before the mayor of *London*, by complaint in writing, in nature of a *monstrans de droit*, declaring all the title. And if the suit be in the spiritual court, the court of *B. R.* may grant a prohibition, though it hath not power to meddle with them. 2dly. It was resolved, that a reservation by a lessee for life, who leases for years to *2.* is not sufficient to bind him in the reversion to pay tithes according to that rate. 3dly. That a rent for half a year, and afterwards for another half year, is a rent. And note, as the same was last let, is but before the demand of the tithes.

Tr. 16 Ja. A. D. 1618. B. R.

Ward v. Britton. [MSS. Calthorpe.]

The statute of 4 H. 4. c. 12. does not affect a vicarage founded before the 1st of R. 2. and it was competent to the pope to dissolve such a vicarage, and re-annex it to the parsonage, notwithstanding that statute. Cro. Ja. 515. 2 Ro. Rep. 97. 127. Palm. 113. 219. S. C.

IN an action of trover and conversion for two lambs, brought by *Ward* against *Britton*, and not guilty pleaded, a special verdict was found; upon which the case appeared to be as follows.

The prior of *Daventre* being seised of the rectory of *Norton* in the county of *Northampton*, appropriated in *proprios usus*, and there being also a vicarage endowed with the altarage and small tithes, an ordinance was made in 30 *H. 6.* by pope *Nicholas*, (which purported in its recital to be made at the petition of the king), that thenceforth the parish church of *Norton* should not be governed by a perpetual vicar, but the cure should be served by the monks of the priory, or by a secular priest *ad nutum prioris, non obstantibus aliquibus statutis, provisionibus, et ordinationibus in contrarium, et licentiâ aliorum quorumcunque non requisitâ.* The prior of *Daventre*, by virtue of this ordinance, served the cure by his monks, or by secular priests, who were removeable at his pleasure, and received the profits of the vicarage until the passing of the act of 27 *H. 8.* when the priory was dissolved, and with all its possessions granted to *John* bishop of *Lincoln*, and *Thomas Audley* lord chancellor of *England*, to the use of the master and fellows of *Christ* college in *Oxford*. The lord *Cromwell* being vicar-general in ecclesiastical causes, united the church and chapel of *Norton* to *Christ Church* college, but without making mention of the vicarage, *ita quod* the college should have all the profits, &c. The king confirmed the union, *ita quod* the church should enjoy the church and chapel. The college served the cure by their priests and curates, allowing them a pension; and afterwards in 37 *H. 8.* the college surrendered the rectory and vicarage to the king, in whose hands they remained until 12 *Ja.* when he granted both to *Ward*, who took the tithes and all the profits, and only allowed a pension to one who served the cure. Some time after, *Britton* obtained a presentation from the king, and was admitted, instituted, and inducted to the vicarage, and being so inducted took the two lambs, as being parcel of the tithes where-with the vicarage was endowed; upon which *Ward*, the patentee, brought this action.

Benedict Langden of the *Middle Temple* argued for the plaintiff.—I conceive, 1st. that by the instrument made by pope *Nicholas A. D.*

1451, there was a dissolution of the vicarage, so that there was no longer any vicarage at all, but only a parsonage as it was at first before any vicarage was endowed. 2dly. I conceive that the plaintiff has good right to the tithes by virtue of the instrument of dissolution, notwithstanding there may be some defects in it. As to the 1st. point, the vicarage being a spiritual thing, and the endowment of it a spiritual act, the pope had power to dissolve it. For notwithstanding he had no right to interfere in temporal things, yet he had full power in spiritual acts, as we see by 14 H. 6. 16. where he dispensed with a monk in his profession; 29 E. 3. 7. where an appropriation was made by him; and 10 E. 4. 30. where it is said, *quod papa omnia potest*. As to what may be objected, that the king's assent is requisite to this dissolution, because he may have an interest in the vicarage by lapse, which he will lose upon the dissolution; I answer, first, that the king's assent is not requisite. For by 40 E. 3. 28. and 31 H. 6. 14. it appears, that a vicarage endowed may be dissolved, and restored to the parsonage by reason of the poverty of the parsonage; and as the king's assent is not requisite for the endowment of it, so it is not required for its dissolution, for *eodem modo quo quid constituitur, eodem modo dissolvitur*; and by the same reason that the assent of the king should be requisite, the assent of the bishop should be requisite, for the bishop is in a nearer possibility of lapse than the king. 2dly. But there is the king's assent in this case; for it appears by the pope's ordinance, that it was made *at the petition of the king*, which demonstrates his assent, according to the *warden and commonalty of Sadler's case*, 4 Rep. 55. where it is holden, that a licence to marry a *nief* imports an enfranchisement. 3dly. Admitting the king's assent to be requisite, as it is in case of an appropriation according to 17 E. 3. 39. yet, if it were done without his assent, it would be well enough, according to the rule laid down in 5 Rep. 39. where it is said, *quod fieri non debuit, sed factum valet*. 4thly. The king's licence shall be here intended; for according to *Priddle and Napier's case*, in 11 Rep. it shall be intended that spiritual corporations have obtained what is available for them in law. And as to the objection that may be made, that this ordinance of the pope is against the statute of 4 H. 4. c. 12. which enacts, that in every church appropriated a secular person be ordained perpetual vicar, canonically instituted and inducted in the same; I say, that the statute of 4 H. 4. being only an affirmative law, will not take away the power of the common law according to 33 H. 8. Dy. 50. which permits a restitution of the vicarage

1618. vicarage to the parsonage when the parsonage is impoverished; and so is 31 H. 6. 14. And this vicarage having been enjoyed 160 years after the execution of that instrument, without any presentation being made to it, there shall not be now any presentation to it, any more than an action will be allowed to be brought upon the statute of *Merton*, where it never has been brought. As to the second point, I say, that all the tithes belong *de jure* to the parsonage of *Norton*, and therefore as upon the death of all the monks the land will revert to the first founder, according to 21 H. 7. 4. and upon the death of the tenant in dower the land will revert to the heir without any express grant; so upon the death of the vicar, and continuance of the parsonage and vicarage together in one and the same hands, the tithes wherewith the vicarage was endowed will revert to the parson. And as to the objection that may be made, that this shall not be permitted, because it is mortmain, I answer, that the vicarage, being a spiritual thing, is not within the statute of mortmain, any more than tithes, obventions, oblations, &c. are, according to 21 E. 3. 5. 2dly. Admitting that the pope's instrument were insufficient to effect a dissolution of the vicarage, yet the prior of *Daventre* having the tithes of the vicarage *de facto* at the time of the dissolution, and in reputation, that is sufficient to give those tithes to the king according to the case of 9 & 10 Eliz. Dy. 264. where a vicarage in reputation was given to the king by s. 1 E. 6. c. 14.; the 22 Eliz. Dy. 368. where a chantry in reputation was given to the king; and 11 Rep. *Priddle and Napier's case*, where a reputative appropriation was given to the king; and it being in the king, the statute will supply all defects, and make that good, which was good only in reputation before, according to the case of *Bedle and Beard* (a), in 4 Ja. where it was adjudged, that the statute

(a) The case of *Bedle and Beard* was thus: In 31 E. 1. the king being seized of the manor of *Kimbolton*, to which the advowson of the church of *Kimbolton* was appendant, by his letters patent granted the manor with the appurtenances to *Humphrey de Bohun* earl of *Hereford* in tail general. *Humphrey de Bohun*, the issue in tail, by his deed in 40 E. 3. granted the advowson, the church being then full of an incumbent, to the prior of *Stonley* and his successors; who at the next avoidance held it in *proprios usus*; and upon this appropriation made, *concurrentibus iis quæ jure requiruntur*, the prior and his successors held the church appropriate until the dissolution of the monastery in 27 H. 8. The manor descended to *Edward* duke of *Buckingham*, as issue to the said estate-tail, and the reversion descended to king *Henry* 8. The duke in 13 H. 8. was attainted of high treason: in 14 H. 8. the king granted the manor, &c. with all advowsons appendant, &c. to *Richard Wingfield* and the heirs males of his body; in 16 H. 8. it was enacted, that the said

statute of 31 H. 8. cures the defect arising from the patron who assented to the appropriation being only tenant in tail; and 30 Eliz. Grymes and Smith's case, where an appropriation without any evidence of endowment of a vicar according to 4 H. 4. was saved by the statute.

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Supra 158.

Wincoll of the *Middle Temple* argued for the defendant.—1st. The tithes of lambs are within the compass of the endowment, and within the word *alteragium*; for so the civilians agree; and in a case between *Turnor* and *Andrews*, 2 Eliz. it was resolved that the word *alteragium* extends to the tithe of wool and lamb, and to all other small tithes and offerings; and *M. 13 Ya.* between *Britton* and *Cartwright* it was decreed accordingly in the exchequer, (which decree was produced and read in court). 2. It shall be intended, that until 30 H. 6. the vicarage was presentative, notwithstanding that it be not found who presented to it, for the endowment of a vicarage is a strong implication that it is presentative, and without more the parson himself shall be said to be patron, and shall present to it; because it is derived out of his parsonage, and

said duke should forfeit all manors, &c. advowsons, &c. which he had, &c. in 4 H. 8.: in 37 H. 8. the king granted and sold for money the rectory of *Kimblston*, as impropriate, in fee; which by mesne conveyances came to the plaintiff for 1,200 l. In 37 Eliz. *Boord*, the defendant, obtained a presentation from the queen by lapse, pretending that the church was not lawfully impropriate to the prior of *Stonley*; 1st. because *Humphrey*, who granted it to the prior, had nothing in it; for that it did not pass to his ancestor by these words "*manerium cum pertinentibus*:" or 2d. because he had no more than an estate in tail, and then by his death his grant was void. But it was resolved by the lord *Ellesmere* lord chancellor, with the principal judges, and upon consideration of precedents, that the plaintiff should enjoy the rectory. For although that by any thing that can now be shewn, the impropriation is defective, (for by nothing that now appears, the issue in tail had any thing in the advowson at the time of his grant to the prior), for that the advowson did not pass by those words, "*cum pertinentibus*;" yet it shall be now intended in respect of the ancient and continual possession, that there was a lawful grant by the king to the said *Humphrey*, the grantor in fee, so that he might lawfully grant it to the prior. *Omnia præsumuntur solemniter esse acta*; all shall be presumed to be done which might make the ancient impropriation good: for *tempus est edax rerum*, and records and letters patent, and other writings, either consume, or are lost or embezzled: and God forbid, that ancient grants and acts should be drawn in question, although they cannot be shewn, which at first were necessary to the perfection of the thing. And if the impropriation had been drawn in question in the lifetime of any of the parties to it, they might have shewn the truth of the matter: but, after the death of the parties, and after so many succession of ages, in all of which the church was esteemed and allowed to be rightfully impropriate, if any objection or exception should now prevail; the ancient and long possession of the owners of the rectory would hurt them. For if those objections or exceptions had been made in the lives of the parties, without any question they had been answered, otherwise in so many successions of ages it would have been impeached or impugned. 12 Co. 4 b.

cannot

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dowment of the vicarage by the ordinary. The 40 E. 3. 27. which discusses the question, is of opinion that an endowment of a vicarage by the ordinary with the assent of the parson, without the assent of the king or patron, is good; for the patron is not at any loss, and the endowment is only a meddling with the spirituality. And the vicar, who is a perpetual vicar upon such endowment, has such a freehold in him that he may maintain an assise or other action against the parson, though a temporary vicar cannot do so, because he has not the freehold in him according to 8 Aff. pl. 36. which agrees in the diversity, and 12 E. 3. 256. In the next place, there being an endowment of the vicarage by the ordinary alone, it must bind until it is avoided, admitting that it were not rightfully made: for it is a judicial act, and will bind until it be undone, according to the rule, *fieri non debuit, sed factum valet*. And with this agrees 22 E. 4. 24. which saith, that this being a judgement special credit is to be given to it; and it is there put, that the vicar's freehold is subject to the charge of the ordinary. And *Mowbray*, 40 E. 3. saith, that though the land where with the vicar is endowed out of the parsonage shall, upon the dissolution of the vicarage, revert to the ordinary; yet land given to a vicar and his successors by another person, shall not do so. 20 E. 3. *Annuities* 32. where the parson had only an annuity of 5l. allowed to him, and the vicar was endowed by the ordinary, with the assent of the parson, with glebe, tithes, and offerings, it was admitted to be well enough. So by 16 E. 3. *Annuities* 24, and *F. N. B.* 152. if there was an annuity only allowed to the vicar, it would be well enough in point of law; and 31 H. 6. 14. saith, that the endowment of the vicar is in ease of the parson. 3. The law takes notice of the pope as supreme ordinary, and therefore, by 29 E. 3. 14. though the pope without the king cannot make an appropriation, yet he may well supply the place of the ordinary in the making of one. And by 11 H. 4. 36. the power given by the pope to hold a benefice with a bishoprick was good enough *quoad* the ordinary, though it was not so *quoad* the king; and therewith agrees 17 E. 3. 39. And *Pl. Grendon's case*, acknowledges such power to be in the pope as the ordinary had: and 25 H. 8. c. 19. allows the pope to have power in spiritual things; and in 19 E. 3. *Jurisdiction* 20. where one prescribed to have an annuity out of tithes, it was holden, that tithes being spiritual things, the annuity was spiritual, and debt would not lie for it at common law: and there it was also holden, that a bishop might prescribe to have

have the first fruits of every benefice. 4. There being a dissolution of the vicarage, that which is allotted to it upon the endowment is also taken away from it, according to the rule, *quando aliquis concedit aliquid, concedere videtur et id sine quo res ipsa esse non potest*. 5. This vicarage was a vicarage dissolved in reputation, because the abbot had constantly, from the year 1451, taken the profits of it; because there was not any presentation to it from that time; because it was generally considered as dissolved. And in spiritual acts the law supplies all defects, and intends them to be legally done, according to the case in 2 Rep. 47. where a lawful discharge of tithes is intended; and 5 H. 7. and 11 H. 7. a lawful union was intended under the general allegation of *concurrentibus iis quæ in jure requiruntur*. This then being a reputative dissolution of the vicarage, and the prior holding it at the time of the dissolution of the monastery, the statute of 27 H. 8. c. 20. will lay its hand upon it, and vest it in the same manner in the king as it was in the prior, according to the cases put in 11 Rep. and *Priddle and Napier's case*, where a reputative appropriation is given to the king by the statute of 31 H. 8. c. 13. and is unavoidable, the act of parliament having supplied the defects.

Crewe e contra.—I conceive in the first place that though a vicarage may be increased or diminished, yet being endowed at the time of passing the act of 4 H. 4. c. 12. it cannot be utterly dissolved. For the statute of 4 H. 4. supplies the defects of the statute of 15 R. 2. which only provides for the allowance of a competency to the vicar. It enacts 1. that the vicars shall be perpetual: 2. It extends to future as well as past appropriations. 3. Religious men shall not be vicars; and so, by consequence, there cannot be a dissolution of the vicarage, because it is not possible that the vicars should be perpetual, and yet there should be a dissolution. And this statute being in the negative controls all acts done contrary to it, according to the case of 3 & 4 Mar. Dy. 135. where it is resolved, that by reason of the negative words in the statute of 5 & 6 E. 6. the sessions could not be holden at any other place than *Beaumaris*; and 33 H. 8. Dy. 50. (d) a grant under the great seal was thought not to be good, the statute of 27 H. 8. c. 8. requiring it to be under the seal of the court of augmentations: and therefore in the case at bar the pope had no power to make a dis-

(d) This case does not apply; the statute not having any negative words, and the general opinion inclining to the contrary.

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solution contrary to the negative words in the statute of 4 H. 4. And besides, it appears by 16 E. 3. *Monstrans de Faits* 166. that the ordinary, parson, and patron, should join in the endowment of a vicarage. And it is to be observed of the cases cited on the other side, particularly of *Pridlle and Napier's case*, that the appropriation there was not an appropriation in judgement of law, but only a reputative appropriation. 2. Admitting that a vicarage could be dissolved after the statute of 4 H. 4. yet the pope had no power to do it, for it concerns the temporal possessions of men over which the pope never had any power; and therefore it appears by 9 Rep. 32. *The case of the abbot of Strata Marcella*, that the pope had no power by his constitutions to restrain the trial by the *ordeal*, and that an act of parliament was made in order to take it away. The 25 E. 3. c. 6. declares the pope to be a usurper upon benefices and seigniories; 30 Aff. pl. 19. it is of no avail to plead the excommunication of the pope; and by F. N. B. 64, 65. a *significavit* could not be granted upon a certificate of excommunication by the pope; and F. N. B. 44. a prohibition was granted where the pope sent a citation for a man; 11 H. 4. by *Hanckford*, the pope's bulls are of no avail to dispense with the temporal law. By 25 or 21 H. 8. c. 13. the pope's bulls were adjudged to be contrary to the law of the realm. The 16 R. 2. adjudges acts done by the pope here in *England* to be done by usurpation; the 7 H. 4. c. 6. subjects any one to a *premunire* who may trouble a vicar with the pope's bulls; and the 29 E. 3. 7. rules that an appropriation cannot be made by the pope. And although during the time that Christendom was under the *Roman* yoke, a great power was attributed to the pope in temporals in regard of his eminency; yet when *England* and other parts of Christendom shook off that yoke, and became independant states, they would not allow him the great power which he had before: wherefore in the case at bar, the possessions of the vicarage being temporal, and the vicarage being made perpetual by 4 H. 4. c. 12. the pope cannot with the horns of his bulls put away this vicarage against the act of parliament. 3. Admitting the pope had the power to dissolve the vicarage, yet the words being only *quod vicario decedente, vicaria regatur et gubernetur per priorem*, and that he shall appoint his monks or a secular priest, who shall be removeable *ad nutum prioris*, to serve the cure, &c. are not sufficient words of dissolution, but are only a personal provision and indulgence for the abbot and his successors during the time that the vicarage

vicarage was in his hands, so that when the vicarage came into the king's hands, this personal provision was of no avail. *Quod fuit concessum* by Montague C. J. and Dodderidge J. for as it is said in *Sutton's case*, 10 Rep. that there are certain words requisite for the creation of a corporation or an officer; so there ought to be apt words of dissolution. 4. Admitting the pope had power to dissolve the vicarage, and that here were apt words of dissolution; yet I conceive that the king's letters patent do not give any title to the plaintiff to take these lambs or any other profits of the dissolved vicarage: for the vicarage being given to the king, as the prior had it, he must make an appointment of the vicar and of the profits of the vicarage, as the prior did, which he has not done in the case at bar: and therefore the plaintiff cannot have any title, and the letters patent shall not be construed to a strained intent. And for this reason it was ruled in (e) *Sir George Shirley's case*, that by the grant of *rectoriam* nothing passed from the king where an abbot had the presentation, and another person had the nomination, and the presentation came to the king by the statute of 31 H. 8.

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(e) The case here alluded to is reported by Moore 894. as of this very term, under the name of *Sir George Shirley v. Underhill and Bussey*, and his report is as follows. A *quare impedit* was brought in C. B. by sir George Shirley baronet, against Underhill and Bussey; and the plaintiff declared, that he was seised of the manor of *Nether-Epington* in the county of *Warwick*, and of the advowson of the vicarage as appendant thereto. The defendant made title to the advowson as appendant to the impropriate rectory of *Nether-Epington*, and deduced title to the crown by the dissolution of the abbey of *Kenilworth*, and thence to queen *Elizabeth*, and pleaded the queen's grant of the rectory and advowson of the vicarage; *absque hoc* that the advowson of the vicarage was appendant to the manor: which issue was tried at bar. And upon the evidence the court directed, that the advowson of the vicarage is of common right appendant to the rectory; but that it might be appendant to the manor; as, if the rectory were before the appropriation appendant to the manor, the advowson of the vicarage might upon the appropriation well be reserved to the patron, and so will become appendant as the advowson of the rectory was. And though the instrument of appropriation be not extant, yet immemorial usage in the presentation is sufficient evidence of the appendancy. The case upon the evidence appeared to be thus: *Shirley* had the nomination, and the abbot the presentation: and the whole court was of opinion, and so directed the jury, that the nomination was the substance of the advowson, and the presentation was but as a ministerial interest: and if the presenter present without nomination, a *quare impedit* lies: so, if the nominator present immediate without presentation, a *quare impedit* lies against the nominator. 24 E. 3. 77. *Quare impedit* 26 & 27. 16 E. 3. *Quare impedit* 166. 1 R. 3. *Quare impedit* 102. 31 H. 8. Dy. 48. 3 Eliz. Dy. 190 F. N. B. *Quare impedit*. But the doubt upon the evidence was, whether, as the issue is general upon the appendancy of the advowson of the vicarage, and the evidence purports the nomination only to be appendant, the evidence maintains the issue. And thereupon a special verdict was found.

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See acc.
Hob. 337.
Sav. 20.
2 Leon. 80.

Montague and Dodderidge said, that it was clear that a vicarage might be dissolved after the statute of *4 H. 4.* as in the case of *11 H. 6. 22.* where the parsonage and vicarage being both void, the patron presented to the church generally, this was a dissolution of the vicarage. And *Dodderidge* was of opinion that a vicarage might well be dissolved by the parson and ordinary; for the parson *de communi jure* is patron, though by a composition the patron of the church may be patron of the vicarage, and present to it; and the statute of *4 H. 4.* makes provision only in case where a vicarage is constituted, and does not restrain the dissolution of a vicarage, but that that may well enough be.

[In the following term *Hill. 16 Ja.* the case was argued again by *Davenport* for the plaintiff, and *Noy* for the defendant.

Our reporter was not present when *Davenport* delivered his argument, and therefore has given no more than the outlines of it; from which it should seem that *Davenport* took nearly the same course with the counsel who had preceded him on the part of the plaintiff. There is a short account of his argument in *Palm. 113.* but it does not appear to be worth the transcribing, and it is doubtful whether the reporter has not confounded it with *Mr. Noy's* argument.]

Noy.—I deny that vicarages are of ecclesiastical consuance, or that the pope had any jurisdiction over them. In *Hoveden 459.* you will find a charter granted by the archbishop of *York* by the command of the pope, and confirmed by *William the Conqueror*, unto *St. Cuthbert et omnibus ejus episcopis successoribus ut omnibus monachis ibidem in posterum futuris, et omnes ecclesias, &c. in manu sua teneant et quiete eas possideant, et vicarios suos in eis liberè ponant qui mibi et successoribus*

successoribus meis de curâ tantum intendant animarum, ipsis vero de omnibus cæteris elemosynis et beneficiis. Concedo insuper, confirmo et præcipio, ut tam ipsi, quam ipsorum vicarii liberi et quieti in perpetuum sint ab omni redditu synodali, &c. This charter I conceive to be a dispensation & *laxatio juris vinculi*, and not a declaration of the law. For if they could of right have vicars, there was no need of any dispensation. It also appears by *Hoveden*, in the beginning of king *John's* reign, that there was a constitution made that vicars should not be negligent in their cure; and by the constitutions of *Otho*, which were made in 20 *H. 3.* (e) you will find that there were vicarages at that time; for otherwise to what purpose should there be a constitution *De institutione vicariorum*. In *Oxfordshire* there are four vicarages (f) which were prior to those constitutions, for they are not subject to those ordinances: and by the decretals in the book *De officio vicarii*, tit. 18. it appears that it was usual for the succeeding parson to turn out the vicar that was put in by his predecessor; and an ordinance is made to prevent that, declaring that the presentation of one to a vicarage shall make him perpetual vicar. As to the objection which has been made, that the statute of *West. 2. c. 5.* gives a *quare impedit* for a vicarage, and therefore it was of ecclesiastical consueance at common law, I answer, that that is no argument at all. For the same reason might be given as to prebends, hospitals, &c. and it is clear that a *quare impedit* lay for them at common law, and the statute of *West. 2.* was merely declaratory of the common law as to them; and therefore by 16 *E. 3. Brief 660.* it is holden that a chapel was of lay jurisdiction, and a *quare impedit* lay for it before that statute (g), with which agrees 14 *H. 3. quare impedit 183.* And by 2 *H. 3. Graunt 89.* it appears, that a fine was levied of an advowson of a parsonage excepting the advowson of the vicarage; which shews that vicarages were prior to that time. And although they were not in the beginning of any account, (for they were but temporary), yet since the law has fixed and settled them, notice must now be taken of them according to their establishment. 2. I conceive that the vicarage and parsonage in the case at bar are two several ecclesiastical benefices, though the prior

(e) *Wilkins* places them in 22 *H. 3.* See his councils.

(f) These four vicarages, it appears from *Serj. Turnor's* report of this case, were in the parish of *Bampton*. But from the *Liber Regis* it should seem that there are now but three vicarages or curacies.

(g) This point was not determined in 16 *E. 3.* for the chapel there was one of the king's free chapels, and as such exempt from the jurisdiction of the ordinary: but the 14 *H. 3.* is directly in support of it.

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of *Daventra* who was the parson, was also the patron; and being two several ecclesiastical benefices, there could not be so good a coalition of them, as there might be, if they had been as one benefice; and therefore if all the tithes of a parish, except only of 40 acres, be appropriated, there must be a new appropriation of the tithes of those 40 acres, otherwise they will not belong to the other appropriation; and if the parsonage, where a vicarage is endowed, be appropriated, by this appropriation of the parsonage the vicarage is not appropriated also; for they are two several ecclesiastical benefices, for which reason there must be a farther appropriation. And that they are two several ecclesiastical benefices is manifest from the opinion of *Fortescue*, 31 H. 6. 13. that the value of the vicarage and of the parsonage is to be reckoned as several values. And if a writ of right of advowson be brought for the parsonage, and a recovery be had, such recovery will not be a recovery of the vicarage; with which agree 17 E. 3. 76. & 5 E. 2. *quare impedit* 165; and by *F. N. B.* 45. two several *indicavits* must be sued out for the parsonage and the vicarage. 3. I conceive that this bull of the pope in the case at bar will not amount to an appropriation of the vicarage to the prior of *Daventra*. 1. In regard of the person who made the instrument or bull; 2. In regard of the person to whom the appropriation was to be made. As to the first, the pope being the person who made the instrument, it is of no avail to constitute an appropriation; for though it concerns such things as are not *merè temporalia*, but are *in ordine ad spiritualia*, inasmuch as they ad to the maintenance of a minister; yet, there being a prejudice redounding to the king, who is supreme patron of all benefices, and is entitled, as such, to the benefit of lapse, according to the book of 17 E. 3. 64. where the king's title to present by lapse is called a presentation and not a collation, the pope could not of himself make an appropriation; and if he did, the king might seize it, until a fine were paid to him for the contempt, though he could not seize it by title of mortmain according to 21 E. 3. 6. And as to the book of 2 E. 3. 23. where an appropriation was made by the pope with the assent of the patron, that appropriation must be taken to be before the council of *Lateran*, when it was lawful for the patron to give his tithes to whom he would, and the joining of the pope was as nothing. In 18 E. 1. where *William Mountgeale* was divorced from his first wife by the bishop of *Worcester*, and after his death an appeal from the sentence was promoted; it was resolved, that no appeal should be permitted, because, if power should be given to the bishop of

of Rome to examine the validity of divorces after the death of the parties, he would draw into question the inheritances of men, with which it is not competent to him to meddle. And in 13 E. 2. among the records remaining in the office of the Remembrancer of the Exchequer, it appears, that the king is patron of all benefices, and therefore suit must be made for restitution of the temporalities to him, and not to the pope, who has no power over the temporalities. And *Rigandus*, who was bishop of *Winchester*, and chaplain to the pope, was of opinion, that the pope had no right to meddle with those things which are *in ordine ad spiritualia*. And as to what has been objected, that the pope had power to dissolve a vicarage, though he had not power to make an appropriation, I deny that he had any such power: for a vicar being a temporal corporation, he could not have power to dissolve it. In *Walsingham*, fo. 99. it appears by the pope's bull, that though he had dissolved the order of Templars *plenitudine potestatis suæ*, yet *de jure* he could not do it; and you will see that the king, upon that bull being sent to him, made a protestation, which you will find in the Exchequer, that he would not do that which was any ways inconvenient to the kingdom; and thereupon, notwithstanding the pope's bull was issued in 5 E. 2. yet the order was not dissolved here until the 17 E. 2. at which time it was done by act of parliament. It appears by 7 E. 3. 4. that it was not very well known at that time what an advowson was; and thereupon it was holden, that by the grant of the church the advowson passed. And as to the books of 40 E. 3. 28. 31 H. 6. 9 E. 4. 22 E. 4. which have been cited to shew that a vicarage may upon occasion be either increased or diminished by the ordinary, I agree that those books are good law; for it is manifest that they intend, where both the parsonage and the vicarage are presentative, and there is no loss at all either to the patron or to the king: for what he loses in the parsonage, he gains in the vicarage; or what he loses in the vicarage, he gains in the value of the parsonage; and so there being no prejudice at all either to the king or the patron, the law may well tolerate an increase or diminution of the vicarage. But in the case at bar it is to be observed, that the parsonage being an appropriation, if there should be a dissolution or diminution of the vicarage, the king would sustain a loss, because there is not any expectancy of presentation for the king to the parsonage: and so also when the vicarage is dissolved in the parsonage, the interest and benefit which the king might have by lapse is entirely gone: for which reason it is, that more is requisite to a dissolution of a vicarage in such a case

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as the present, than there is to the dissolution of a vicarage where the parsonage is presentative. In *Tr. 37 Eliz. Rot. 344. B. R. Austin and Twine's case*, notwithstanding it was resolved there, that a union might be made of two churches by the patron and ordinary without the king's assent; because the king had the same benefit after the union as he had before it; yet a union could not be made to a church which was appropriated to a dean and chapter or college without the king's assent, and this in regard of the loss that might ensue to the king in the advantage of his title to collate by lapse; for in *8 R. 2. Graunt 104.* it appears that a union of two chapels to the bishoprick of *Coventry and Litchfield* by the pope without the king's assent was not good: and *6 H. 7. 13.* where a union was pleaded of a church to *Magdalen college in Oxford*, a *proferit* was made of the king's licence by letters patent; which is an argument that it could not be made without the king's licence; and *50 E. 3. 26.* where a prebend was changed into a treasuryship, the king's confirmation was pleaded. The vicarage therefore in the case at bar being presentative and secular, it could not be dissolved and made parcel of the regular possessions of the prior of *Daventre* by the pope without the king, who would lose by it the advantage which the law gives him of collating by lapse. 4. I hold that it is apparent from this instrument or bull, that there never was any intent in the pope to make an utter dissolution of the vicarage; but his intent was, that whereas *before* the vicar was perpetual and presentative, and took the profits to his own use, he should *now* be only donative and temporary, and should receive and collect the profits to the use of the prior and convent of *Daventre*; for the instrument has not a word of dissolution, but it has only words which empower the prior of *Daventre* to appoint one of his monks or a secular person to be the vicar, *ad nutum prioris instituendum et removendum*; and this does not dissolve the vicarage, though it changes the estate; and notwithstanding such change, he who is appointed vicar has *titulum et curam animarum*, and may bring an action against any one but the prior himself to recover the profits of the vicarage, as it appears by *2 H. 4. 24.* & *12 H. 4. 17.* where in the case of a vicarative and removable it is holden, that he may maintain an action against any one except only his head and governor; and in *33 E. 3. Ayl de roy, 130.* it is holden, that the patron of a donative church shall take the profits to himself in the time of vacation; and yet by *6 H. 7. 14.* if a stranger had taken the profits from him no action would have been maintainable against him. And that a
vicarage

vicarage or other ecclesiastical living may well be at will or upon condition is manifest from *Gregorius* in the 15th book, where it is said, that there are two manner of vicars; the one is *vicarius titularis qui habet curam animarum*; the other is *vicarius conductitius et mercenarius qui est sine titulo. Et vicarius titularis vel est perpetuus, vel in tempus et sub conditione.* And by 17 E. 3. 42. it appears, that if the king granted a donative deanery to one, the patentee had only an estate at will. 5thly. I hold, that after the statute of 4 H. 4. c. 12. there could not be any dissolution of a vicarage; for that statute says, that *all vicarages united, annexed, or appropriated, &c. how well soever they, &c. by virtue of such licences may any ways be in possession of the same in any time to come, they shall be also utterly void, revoked, repealed, adnulled, and disappropried for ever*; and therefore the instrument or bull in the case at bar purporting only to be a licence to the prior of *Daventre* to hold possession of the vicarage is merely void. And though there be the word *such* in the statute, yet that is to be intended of licences that were *such* in mischief and inconvenience; and it is not material though they should not be *such* in time; for the statute was directed to the mischief and inconvenience, and not to the time, as is manifest from the purport of it; and the mischief would be greater in all likelihood after making the statute, than it was before. And in *Alexander Poulter's case*, 11 Rep. it appears that the word *such* in the statute of 5 & 6 E. 6. c. 10. is to be intended of *such* in mischief and inconvenience. 2dly. The last clause in the statute of 4 H. 4. enacts, that *no religious be in anywise made vicar in any church so appropriated, or to be appropriated, by any means in time to come*; and here the instrument of dissolution, if it effects a dissolution, empowers the prior to put in a religious man to be vicar, which is contrary to the statute, and therefore cannot be good; according to the case of 3 H. 6. 24. where an action of debt was brought for rent reserved upon a lease for years granted by a vicar, to which the defendant pleaded that the plaintiff was a monk professed; and it was holden by *Martin*, that if the plaintiff had not been made vicar before the statute of 4 H. 4. the writ must have abated, because he was a religious man, and that statute says that no religious man shall be a vicar. And as to the objection that has been made, that in this case there was a dissolution in reputation, and therefore the vicarage is vested in the king by the statute, and all imperfections are cured according to the cases put in *Priddle and Napier's case*, I answer, that this priory was dissolved by the statute of 27 H. 8. and that statute only enacts, that
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Supra 13.
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men shall hold according to the purport and effect of the letters patent, and the letters patent pass only all hereditaments, and not the vicarage expressly and by name; and therefore the statute could not extend to it. 6thly. I hold that the vicarage did not pass by the king's letters patent, because the king only granted *rectoriam* in *Norton, et advocationem vicariæ*; and the vicarage being a distinct ecclesiastical benefice from the parsonage, could not pass by the word *rectoriam*; and by virtue of the words *advocationem ecclesiæ* it could not pass, because the vicarage, consisting of glebe and tithes, is a distinct thing from the advowson; and 44 E. 3. 33. & 44 Aff. accord with this opinion.

Cur.

Wide 17 E.
3-51. Fitzh.
Grant, pl.
57-

Montague C. J. Croke and Dodderidge J. thought that vicarages began to be in use when appropriations began; for when the corporation could not serve the cure by themselves, they substituted a vicar. And vicarages could not well begin before the division of parishes, and before certain pastors were appointed to each church. And though vicars had not at first any certain estate, so that they could maintain an *assise, juris utrum*, or other such actions; for that they had only a temporary interest, and no absolute disposition of the profits; yet continuance of time made them perpetual, and enabled them to bring actions against strangers and against the very persons themselves who were their patrons, as we see by 40 E. 3. 28. & 14 E. 3. c. 17. 2. They resolved, that a vicarage might well enough be dissolved after the statute of 4 H. 4. for that statute extends only to the case where an appropriation is made, and no vicar is endowed, or where a religious man is made vicar; and it does not extend to prevent the dissolution of a vicarage. 3dly. They seemed to incline to be of opinion with *Davenport* upon all the points, except the instrument and bull of the pope, upon which they were in some doubt, whether it would amount to a dissolution of the vicarage in respect of the person who made it, and also whether in respect of the words it would amount to a dissolution, or to a temporary provision.

Bridgeman.

In *Mich. 17 Ja.* the case was argued again by *Bridgeman* for the plaintiff, who spoke only on two points: the first was, whether the statute of 15 R. 2. c. 6. or the statute of 4 H. 4. c. 12. restrained the pope from dissolving the vicarage: the second was, whether the instrument in question was sufficient to dissolve it. As to the first point, the words of the statute of 15 R. 2. being that *in every licence from henceforth to be made in the chancery of appropriation of any parish church, it shall be expressly contained and comprized,*
that

*that the dioceſan of the place, upon the appropriation of ſuch church, ſhall ordain according unto the value of ſuch churches a convenient ſum of money, to be paid and diſtributed yearly, of the fruits and profits of the ſame churches, by thoſe that ſhall have the ſaid churches in proper uſe and by their ſucceſſors, to the poor pariſhioners of the ſaid churches, in aid of their living and ſuſtenance for ever; and alſo that the vicar be well and ſufficiently endowed; it appears that this ſtatute, by reaſon of the word henceforth, extends only to appropriations thereafter to be made, and not to thoſe already made; and though it provides that in every licence of appropriation, care ſhall be taken that the vicar be ſufficiently endowed, ſo that he may intend the cure of ſouls, according to the conſtitution of Othobon, made in 32 H. 3. and in the year of our Saviour 1248, which wills, that if a competent portion be not aſſigned to the vicars for the maintenance of their cure, the dioceſan ſhall ſupply it; and alſo that hoſpitality be uſed for the relief of the poor; yet, if there were no ſuch provision made in the licence, the appropriation was good enough, and was not annulled by the ſtatute. For the ſtatute was only a precept to the officers who made out the licences to make them in ſuch manner, and it was a contempt in them, if they made them in any other manner; but it did not make the licences void, according to 5 E. 3. 43. where it is holden, that a licence of ſafe-conduct without naming the maſter of the ſhip, and mentioning the exact number of mariners, is well enough; for the ſtatute of 15 H. 6. c. 3. is rather a precept how the officers ſhall make out the licence of ſafe-conduct, than vacates it, if it be not made in that very form. So, 33 H. 8. Dy. 50. the letters patent under the great ſeal were holden to be good enough, notwithstanding the ſtatute directs that they be under the ſeal of the court of augmentations; for it is rather directory, than in avoidance of the letters patent. But this being a great defect in the ſtatute of R. 2. the ſtatute of 4 H. 4. c. 12. was paſſed to ſupply it; the firſt branch of which enacts, *that if any church be appropriated by licence of the ſaid king Richard, or of our ſovereign lord that now is ſince the ſaid fifteenth year, againſt the form of the ſtatute of 15 R. 2. the ſame ſhall be duly reformed according to the effect of the ſame ſtatute, betwixt that and the feaſt of Eaſter next coming. And if ſuch reformation be not made within the time aforeſaid, that the appropriation thereof made be void and utterly repealed and adnulled for ever, except the church of Haddenham; ſo that it appears that this branch of the ſtatute tends to the annulling of ſuch appropriations as were made after the 15 R. 2. in which the**

form

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form prescribed by that statute was not observed, and does not extend to any time prior to that statute. And as to the second branch of the statute which ordains, that *the vicarages united, annexed, or appropriated, and the licences thereof had after the first year of the said king Richard, how well soever that they who have united, annexed, or appropriated such vicarages, be in possession of the same vicarages, or by virtue of such licences may in anywise be in possession of the same in any time to come, they shall be utterly void, repealed, and annulled*; it appears, that this branch extends only to appropriations made after the first of R. 2. and not to appropriations made before. And as to the third branch, which enacts, that *henceforth in every church so appropriated a secular person be ordained vicar perpetual, canonically institute and inducted in the same, and conveniently endowed by the discretion of the ordinary to do divine service, and to inform the people, and to keep hospitality there, except the church of Haddenham aforesaid; and that no religious person be in anywise made vicar of the said church so appropriated, or to be appropriated by any means in time to come*; it appears, that the first part of this branch of the statute extends only to appropriations made after the statute of 15 R. 2. by reason of the word "*henceforth*;" and the last part of the branch shall be expounded in the same manner by reason of the copulative "*and*," which couples both the sentences together, and shall make them agree in point of time; according to the book of 5 H. 7. 17. (b) where it is holden, that the count in trespass being *quare sic idem* such a day, year, place, *fregit, et eandem cepit et asportavit*, the copulative "*et*" made the caption and asportation to be at the same time and place as the breaking was. 2dly. It is manifest, that the makers of the statute were not forgetful of the time to which they willed the statute to extend, because the words "*appropriated or to be appropriated*," intend that such churches as were appropriated from the 1 R. 2. until the making of the statute, and all other churches to be appropriated in future, should be comprehended within the statute. 3dly. The exception of the church of *Haddenham*, which was appropriated in the time of H. 4. is strong proof that it was not the intent and meaning of the statute to extend to appropriations made before the time of R. 2. 4thly. The making of religious persons vicars being in no wise contrary to law, it cannot

(b) Qu. Whether this reference be correct, as no such point appears to have been moved.

be intended that such estates as were settled a long time before the act of parliament, should be unsettled by a retrospect to a precedent time. And as to what has been objected out of *Poulter's case*, in 11 *Rep.* 33. it makes for me: for *sic appellati* refers to such only as are appealed of malice, so that if they were not appealed of malice, and there was an indictment precedent, the appellees would not recover damages upon the statute of *West.* 2. c. 12. as we may see in 40 *E.* 3. 42. and 33 *H.* 6. 2. And it was now lately adjudged in *John Webbe's case*, upon the statute of 28 *Eliz.* that the words "*so proclaimed*" in the statute, must mean according to the form of the proclamations there declared. And the statute of 21 *H.* 8. c. 15. for the falsifying of recoveries, hath, by reason of the words "*from henceforth*," been always interpreted of recoveries after the statute. In the statute of 34 & 35 *H.* 8. c. 26. there is a special provision inserted for grants made by the king before the statute as well as after it, and a clause after the word "*such*" is intended of the grants before mentioned; as appears by *Wiseman's case*, 2 *Rep.* 15. In the case at bar, therefore, the words "*so appropriated*," must be understood of such appropriations as are made after 1 *R.* 2. for those only are mentioned before, and they shall not be intended of those that were made at any time. 5thly. The last part of this branch of the statute, which is, that *no religious person be in anywise made vicar, &c.* was introduced merely to corroborate the first part of the statute, because otherwise the persons to whom the appropriations were made, would have put in one of their own monks or brethren, who would have done nothing but for the benefit of the house; and by that means the statute would have been frustrated. For according to 14 *H.* 4. 16. and 3 *H.* 6. 23. a religious man might well be a vicar; and therefore to prevent that was this last part of this branch of the statute inserted. 6thly. The statute of 4 *H.* 4. extends only to unions and appropriations, and not to dissolutions; the case at bar therefore being concerning the validity of a dissolution, and not concerning a union, the statute will not extend to it. And it appears by 31 *H.* 6. 14. and 20 *E.* 4. 6. that if a rectory be impoverished, the vicarage may be dissolved: which shews that the dissolution of a vicarage is not within the statute of 4 *H.* 4.

As to the second point, that is, whether this instrument of the pope be sufficient to effect a dissolution of the vicarage, I insist that it is sufficient. For the vicar being a person who is appointed by the ordinary to serve the cure in the room of the rector, and having
a certain

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any

any licence of the ordinary and the constitutions of *Otho* and *Othobon*. The fifth part contains a provision for the cure of souls, and also for an indemnity to the bishop for the loss of his institution, and to the archdeacon for the loss of his induction, and an allowance is made to them for that loss by an annual payment of 2 s. The sixth part contains the pope's curse upon those who should infringe the ordinance. All these parts of the instrument shew, 1st. that there are sufficient words to effect a dissolution of the vicarage; for there is an utter exclusion of a perpetual vicar, and an ordinance is made that the church shall be governed by the monks of the priory, or by secular persons removable at the will of the prior and convent. 2dly. They shew that it was the intent to make a perpetual dissolution of the vicarage. 3dly. The subsequent usage shews that this ecclesiastical act made a perpetual dissolution. As to the first, it appears, that since by the instrument there was an exclusion of a perpetual vicar as to cure and function, it will necessarily follow that there must be a dissolution or reverter of that which was given for the serving of the cure; according to the case of 7 E. 4. 22. where it is holden, that if an annuity be granted for the exercise of an office, if the office be determined, the annuity will be also at an end; and by 5 E. 4. 8. 1 H. 7. 29. and 8 H. 7. 4. where land is appendant to an office, and passes without livery by a grant of the office; if the office be determined, the land will revert to the grantor of the office. As to the 2d. viz. that it was the intent to have a perpetual dissolution, it appears from the prior's petition, and also by the proposition made by the prior for the supply of their wants, that their design was to have a perpetual dissolution; for otherwise there would not be a perpetual supply of their wants according to their petition and proposition; and when the pope is making an ordinance for their remedy, it cannot be intended but that the remedy shall be proportionable to the mischief: and as the prior and convent were perpetually to serve the cure, or to be charged with the providing of some one to serve it, so they had a perpetual benefit in respect of such charge, according to *Digby's case* in 4 Rep. 79. and *Elmer's case* in 5 Rep. 2. The *non-obstante* of the ordinance of *Otho* and *Othobon* in the instrument, shew that it was the intention to have a perpetual dissolution, because that ordinance relates to perpetual vicars and their endowments. 3dly. The charge which is imposed upon the prior and convent for the bishop and archdeacon, in respect of their loss of institution and induction, further shews, that it was the intent

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Cro. Ja. 415.
1 Ro. Rep.
398. 436.
Bridgm. 84.
3 Bullfir.
192.

Supra 207.

to have a perpetual dissolution; for it is not reasonable that the prior and convent should have a perpetual charge imposed upon them, and yet should have but a temporary benefit. And it appears by 4 E. 6. *Br. Estates* 78. and *Collyer's case* in 6 Rep. that the law makes an exposition of the estate according to the charge; and therefore where there has been a devise to one paying 10 l., it has been adjudged to be an estate in fee simple; and *Hil. 13 Ya. B. R. in the case of Webbe and Hearing*, it was adjudged, that where a devise was made to one for life, remainder over to another, paying 10 l. *per ann.* for ever, the devisee had a good estate in fee simple according to the proportion of his charge. 3dly. The usage subsequent to the making of this instrument affords a good exposition, that it makes a perpetual dissolution. In 17 E. 3. 51. *Mowbray* took it as a rule, that obscure words are to be expounded by usage; and in *the case of Smith and Barkefdale*, M. 39. and 40 Eliz. *Ret.* 209. B. R. where a rectory was appropriated in the time of H. 3. and a vicarage endowed with *decimis garbarum*, it was ruled, that the vicar having been used to take the tithe of hay within the hamlet as well as of corn, that usage should afford an exposition of the ecclesiastical instrument, because it might well be that at that time *garba* might signify hay and grafs as well as corn. In 5 Rep. *Cawdrie's case*, 4. & 7. where an ecclesiastical sentence was given by some of the commissioners with the assent of the others, such sentence was ruled to be well enough according to the intendment of the ecclesiastical law, notwithstanding that by the rules of our law it would have been bad. And it appears by 6 & 7 Eliz. Dy. 233. 34 H. 6. 14. 11 H. 7. 14. 10 Rep. 29. that ecclesiastical acts are expounded by the judges of our law according to the ecclesiastical law; and the civilians have certified their opinion, that this instrument is sufficient to make a dissolution of the vicarage. 4thly. Admitting that here was not a perpetual dissolution of the vicarage, yet it being reputed as a perpetual dissolution in the hands of the prior and convent, the statute of 35 Eliz. c. 3. will aid, which enacts that *all honours, manors, lands, tenements, and hereditaments, which at any time heretofore were the possession of any abbey, monastery, priory, nunnery, &c. were and shall be reputed, taken, and adjudged to have been lawfully and perfectly in the actual or real possession of the said late king and his heirs and successors, &c. notwithstanding any defect, want, or insufficiency of or in any surrender, grant, or conveyance of the same honours, manors, lands, tenements, or hereditaments, &c. or any other matter or cause whatsoever, by which*

his highness was or might have been entitled unto the same, &c. This therefore being taken to be a dissolved vicarage in the hands of the prior and convent, it shall be so in the hands of the king; and, consequently, its defects shall be supplied by this statute of 37 *Eliz.*

Montague, Dodderidge, and Houghton, (Croke being absent propter Cur. agritudinem), were of opinion that judgement should be given for the plaintiff: and they resolved, 1st. That the statute of 4 *H. 4. c. 12.* does not extend to appropriations made before the 1st of *R. 2.* and that such appropriations as were made before that time are directed and governed by the rules of the common law; so that if the pope had power, by his bull, to make a dissolution at common law, he has still the power to do so; and, consequently, the appropriation in the case at bar being made before the 1st of *R. 2.* the vicarage may well be dissolved, and the statute of 4 *H. 4.* does not prevent it. But, if the appropriation had been made after 1. *R. 2. (i)* then the pope would have had no power to dissolve the vicarage, because that statute strengthens the vicar's estate, so that it cannot be dissolved; nor can its possessions revert to the parsonage, as they might at common law.

2dly. They resolved, that this instrument being an ecclesiastical instrument, ought to receive an exposition according to the ecclesiastical law; and, therefore, if the ecclesiastical law says that it was a sufficient instrument to make a perpetual dissolution of the vicarage,

(i) Rolle states that *Dodderidge and Houghton* held, that "if the appropriation had been within the statutes of 15 *R. 2.* and 4 *H. 4.* neither pope nor ordinary could have dissolved the vicarage; for if they could be supposed to have that power, the great design of the statute of 4 *H. 4.* namely, to have a vicar perpetually incumbent, might be defeated at pleasure." And bishop *Gibson* adds, that though such a power of dissolution were supposed to be consistent with the statute of 4 *H. 4.* it seems by no means reconcilable with the disabling statute of 13 *Eliz. c. 10.* against the granting or conveying the possessions of vicars, as well as of others, in any other manner than that statute directs. *Gibson's Codex* 754. However in the case of *Parry and Banks, M. 12 Ja.* in the exchequer, (which case was cited in one of the arguments in the principal case, *Cro. Ja. 518. 2 Ro. 100. Palm. 114.*) where a vicarage was endowed in 25 *H. 8.* in a church which was appropriated to the dean and chapter of *St. Asaph*, and in 24 *Eliz.* was dissolved by the bishop and re-united to the rectory, it was holden by the barons, that the dissolution was good; because the appropriation being to the dean and chapter, and so remaining in a spiritual hand which was capable of the cure, it might well be dissolved. And this appropriation being one of those which came into the king's hands in 31 *H. 8.* and was by the king transferred to the dean and chapter, the court further resolved, that if the impropriation had become a lay fee in the hands of a temporal possessor, the vicarage could not have been dissolved, because that would have been in effect to destroy the cure.

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they were bound to give faith and credit to it, and to give judgement accordingly.

3dly. They resolved, that this being a dissolution of the vicarage in reputation in the hands of the prior and convent, and so coming into the hands of the king, the statute of 31 H. 8. c. 13. will vest it in the king, and will give it to him, and supply the defects of the dissolution, if any there be, according to *Priddle and Napier's case*; and the statute of 35 Eliz. c. 3. will likewise interpose its aid in order to supply any defects.

4thly. They resolved, that the vicarage being dissolved, the lands and tithes with which it was endowed should revert to the person from whom they were originally taken: for if there be a cessation of the function, there shall be also a cessation of the benefit. And judgement was given for the plaintiff.

Palm. 222.

A writ of error was afterwards brought in the exchequer chamber, and the judgement was reversed; not however upon the matter in law, but upon a formal objection to the entering of the judgement. For the action was brought for two lambs; and for one the jury found a special verdict, upon which judgement was given for the plaintiff; but as to the other, the jury found the defendant not guilty. But in the judgement the defendant was not discharged of this lamb, nor was the judgement entered as to that *quod querens eat inde sine die*, but only that the defendant be in *misericordia* for that lamb; and for this error the judgement was reversed, *M. 19 Ja.* It may be added, that it appears from the *Liber Regis*, that the vicarage or curacy at this day belongs to the *Britton* or *Breten* family; the impropiators of the parsonage.

P. 17 Ja. A.D. 1619. B. R.

Johnson v. Dandridge. [MSS. Calthorpe.]

Fulling-mills are not tithable. Cro. Ja. 523. 2 Ro. Rep. 84. S. C. Rolle states that the prohibition was granted.

AUBREY *Johnson*, parson of in the county of *Yerk*, libelled against *Dandridge* in court christian for the tithe of a fulling-mill, and for 6 s. 8 d. which was a *modus decimandi* for a water-mill; and upon a suggestion that no tithes are payable by the common law of the kingdom for such things as are invented for the ease of man's labour, and that fulling-mills are of that nature, *George Croke* moved for a prohibition; and day was given to shew cause why a prohibition should not be granted. At which day I shewed cause: and I stated in the first place, that this was a mill newly erected, and being such, tithes were payable for it, according

to the statute of *Articuli cleri*, c. 5. in 9 E. 2. where, upon a petition exhibited by the laity, *Quod si aliquis in fundo suo molendinum erexerit de novo, et postea a rectore loci decima exigatur, de eodem exhibeatur regia prohibitio sub hac formâ, Quia de tali molendino hætenus decimæ non fuerunt solutæ, prohibemus, &c. et sententiam excommunicationis si quam hæc occasione promulgaveritis revocetis omnino*; the king answered, *In tali casu nunquam exivit regia prohibitio de principis voluntate, qui et decernit talem perpetuò non exire*. And agreeably to this resolution of the king in parliament the practice has always been that tithes are to be paid of newly erected mills; and a difference has been taken between ancient mills and newly erected ones; and, therefore, in a case in *B. R.* in 5 *Ja.* it was resolved, that tithes were demandable of newly erected mills, though ancient mills were to be tithe-free; and according to this difference it was agreed *P. 7 Ja.* and in the case of one *Newman*, *M. 13 Ja.* in *C. B.*; *Tr. 14 Ja.* in *B. R.* in the case of *Bury and Daniel*; *Tr. 15 Ja.* in *B. R.* And in *M. 38 & 39 Eliz.* in *B. R.* in the case of *More and Russell*, it was admitted, that tithes might be demanded for a windmill newly erected; though, because in that case the windmill was erected upon the demesnes of a manor which had been always discharged from the payment of tithes by a modus, a prohibition was granted. 2dly. It appears by the statute of 27 *H. 8. c. 20. 32 H. 8. c. 7. 2 & 3 E. 6. c. 13.* that tithes ought to be paid according to the ecclesiastical laws and ordinances of the church of *England*, and after the laudable and usual customs of the parish where the party dwelleth; and by the ecclesiastical laws, and ordinances of the church, tithes are payable of mills, as appears by the statute of *Articuli cleri* before cited, and by *Lindwood* in his book *De decimis*, chapter, *Quamquam exsolventibus*, and comment on the words *sicut fæni*, where the opinion of *Peter de Anchona* is cited to be, *quod in decimâ fæni de molendinis, piscariis, lanâ et apibus, quæ de certis locis percipiuntur, non videtur considerata parochia habitationis, sed loci ubi consistit, licet multum plus in horum fructu hominis industria operatur, quam locus facit*. And in the same book, chapter, *Quoniam propter*, and paragraph *De proventibus*, the constitution of archbishop *Stratford* is given; which is, *De proventibus autem molendinorum volumus quod decimæ fidelitèr et integrè solvantur*; which word *integrè* the gloss expounds to be *sine diminutione, sicut solvantur decimæ proventuum, verè, sicut proventus accidunt, viz. decima mensura quorumcunque granorum molitorum ad commodum domini molendini vel molendinarii pertinentium*.—*Et scias, quod fructus provenientes ex molendino decimabuntur tanquam prædiales, non deductis expensis factis in re,*

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circa rem, vel extra rem. And the tithing table in the 11th question set forth by the allowance of the church of England, determines, that the tithes of mills, parks, ponds, warrens, dovehouses, and bees, are predial and tithable without deduction of charges, and the 10th measure of the corn is to be set out. And in the 4th question of the tithing table, a predial tithe is explained to be that which is perceived of the ground, and gathered of and from a place certain, in some one or other known, certain, and limited parish. And such tithes are to be paid to the parish church where the grounds do lie without deduction of charges, howsoever the industry and labour of man may seem and be alleged more to prevail in the making thereof, than the nature of the ground. And Rebuffus, fo. 23. § 6. saith (k), *De molendinis decima prestat, ut si decem sextaria frumenti, siliginis, aut alterius grani molendini nomine consequar, unum pro decima solvere adstringor, vel alias pro rata: si vero pecunia pro molendini pensione solvatur, ex illa pecunia decima solvetur illi ecclesie ubi molendinum situm est, etiam si esset molendinum adventum, vel molendinum cathenâ super fluvio teneretur.*

And as to what has been objected, that the mills in the case at bar are fulling-mills, and of new invention, and that therefore the statute and ordinances above cited cannot extend to them, for that they only intend such mills as were in use at that time, I answer, that the statute and ordinances are generally of mills, which is the genus, and the others are but the species contained under the genus; and the statutes and ordinances being general of a mill, a fulling-mill is contained under it. And it appears by *Luttrell's case*, 4 Rep. 87. that a fulling-mill may be recovered by the demand of a mill generally; and a prescription to have a water-course to a corn-mill will serve where the corn-mill is changed to a fulling-mill. And as to the objection that the tithes of fulling-mills are personal, and the statute of 2 & 3 E. 6. enacts, that personal tithes shall not be paid but where they have been accustomedly used to be paid within 40 years before, I answer, 1st. From the authorities before cited that the tithes of mills are predial. 2. The statute declares what are to be understood to be personal tithes, where it says, that "every person exercising merchandizes, bargaining and selling, clothing, handicraft, or other art or faculty, being such kind of person and in such places, &c." so that he who works a fulling-mill can-

(1) This passage is extracted from *Rebuffus's Tractatus novem de decimis*, &c. a very scarce book, which I met with in the library belonging to the College of Physicians in *Warwick Lane*, where there is a very good collection of civil and canon law.

not be said to be any of the persons there enumerated, for which reason it cannot be said to be a personal tithe. And in *M. 12 Ja.* in *C. B.* where, upon a libel against *John King* for the tithes of two grist-mills, a prohibition was moved for, because in the place where the grist-mills then stood there had been a fulling-mill, for which and another grist-mill, there had been time whereof, &c. 6 s. 8 d. per annum paid, and that at such a time the fulling-mill was converted into a grist-mill, and that he had paid the 6 s. 8 d.; *Warburton* and *Nicholls J.* refused the prohibition, for the modus could not extend to a grist-mill, that being a new thing; and tithes are to be paid in a different manner for a fulling-mill than they are for a grist-mill; for a fulling-mill they are to be paid by the 1 d. and of a grist-mill by the toll-dish. And so upon the whole matter I concluded that tithes were to be paid of fulling-mills.

Montague C. J. Croke and *Houghton J.* seemed at first to incline that a prohibition should not be granted, for that tithes ought to be paid of fulling-mills as well as of other mills; but they seemed to say that they were personal, and not predial tithes. But *Dodderidge J. e contra*; for he said that a great inconvenience would ensue if tithes were to be paid of fulling-mills; for by the same reason that they might be paid of fulling-mills, they might be paid of paper-mills, iron-mills, tin-mills, and all other mills of that nature, which would be excessively inconvenient. And he did not know in what manner tithes would be paid of fulling-mills, for it is not reasonable that they should be paid of the tenth cloth. And he did not find any text in the civil law, nor any opinion what tithes were to be paid of such mills.

P. 17 Ja. A. D. 1619. B. R.

Wright v. Powle. [MSS. Calthorpe.]

SAMUEL Wright and *John Baldwin*, the impropriate rectors of *Chebbam* in the county of *Buckingham*, libelled against *Richard Powle* for the tithes of aspen and cherry trees: and upon a suggestion that those trees were of the age of 20 years, and are by the custom of that country reputed as timber-trees, a prohibition was granted, and a motion being afterwards made for a consultation it was refused; for that may be timber in one country which is not timber in another country; as the cutting of willows and fallows

Aspen trees
may be timber
by custom.

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M. 17 Ja. A. D. 1619. B. R.

Dickinson v. Reade. [MSS. Calthorpe.]

2 Ro. Rep.
118. S. C.
by the name
of Dixon's
case.

IN an action on 2 & 3 E. 6. brought by *Dickinson* lessee of *Fleming*, the son and heir of sir *Thomas Fleming* chief justice of *England*, against *Reade*, lessee of *Popham*, the case appeared to be as follows: The abbot of *Quarrier* in the county of *Southampton*, being seised of the rectory of *Arreton*, and also of a grange called *Arreton Grange* in *Arreton*, in 16 H. 8. made a lease for 90 years of the grange and the tithes of it, to J. S. Afterwards, the rectory of *Arreton*, the grange, and all the possessions of the abbey, came to the king by the statute (m) of dissolutions. In 2 E. 6. (n) the king granted the rectory of *Arreton*, and several other lands of the abbey, to one *Hills* (under whom sir *Thomas Fleming* claimed) *quæ omnia præmissa extenduntur ad clarum valorem* 32 l. which value was specified in the particular of the auditor of the crown, to which the patent referred, and it appeared that the tithes of the grange were not mentioned in the particular, and that the lands and rectory contained in the king's patent were of the value of 32 l. exclusively of the

(1) *Lapthorne* sued in the spiritual court of *Gloucester* for the tithe of wood; and *Bridgeman* moved for a prohibition, because the suit was for beeches, which were of a great age, viz. eighty years old at the least; and also because the parson of the parish had had a consideration for the tithe of wood, namely, a certain wood in the lord's wood for the tithe of wood time whereof, &c. and that he never had taken any tithe of wood. —*Coke*.—Buck is a beech, and thence the county of *Buckingham* took its name; and beech is timber in that country, and therefore it was adjudged in Sir *George Caryl's* case that waste lay for beeches there. And in the parish in which I live tithe wood has never been paid; but the parson has a wood, which is called the tithe-wood, for which he pays 4 d. a year to the lord of whom he holds it. It shall be intended therefore that the wood in question was given upon a composition for all the tithe of wood within the parish, no tithes of wood having ever been paid. And a prohibition was granted, *Lapthorne v.*

1 Ro. Rep. 355. P. 14 Ja.—A record of a prohibition was shewed by *John Moore* serjeant, P. 14 Ja. Rot. 1918. between *Gussy* plaintiff, and *Pindar* parson of *Mottesfont* in the county of *Southampton*, for tithes of willows, upon a surmise, that they are of use as timber in that country. If willows grow within the site of a house, it is waste to fell them; yet, if they be felled, I hold they shall pay tithes. Note the reason, *Hob.* 219.

(m) Qu. for this was one of the Dissolution abbies.

(n) *Tanner* says that the grant was in 36 H. 8.

tithes

tithes of the grange; and the king afterwards granted the rectory in fee-farm. And now it was resolved by *Montague C. J. Croke, Dodderidge, and Houghton, J.* 1st. That tithes were to be paid for the grange as soon as the lease for years was expired, notwithstanding the union of the rectory and grange in the hands of the abbot at the time of the dissolution, and notwithstanding there were no tithes in specie paid to the abbot at that time, agreeably to the resolution in the case of *Dobitost* and *Curteene*. For it appears from the lease of the land and tithes, that there was not any real discharge of the grange, but only a personal discharge in respect of the union; in which case, as the rectory and grange are now come into the hands of several persons, tithes shall be paid of them: and if there had been no lease expressly made of the tithes, the abbot would have had them notwithstanding the lease of the land.

2dly. They resolved, that the tithes of the grange remained parcel of the rectory notwithstanding the lease for years; so that by the grant of the rectory the reversion of the tithes passed.

3dly. They resolved, that the *quæ quidem præmissa sunt annui valoris, &c.* are not words of restraint, so that nothing would pass beyond that value; but that they are merely words of declaration to shew what value those things which passed were; and though those should be of greater value than was mentioned in the particular, yet the patent would be good upon the statute of 1 E. 6. c. 8. and there is only an allowance to be made to the king for the overplus of the value according to the rate of 20 years purchase. And *Dodderidge* said, that the tithes of the grange are included in the value of the rectory; for though there is a lease for years of the grange and tithes rendering rent, yet the rent issues out of the grange, and not out of the tithes, though it be increased in respect of the tithes.

The value of the tithes was trebled in this case by the jury; and notwithstanding the plaintiff declares of tithes of several things, yet it is sufficient to lay the damages entirely.

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Unity of possession of lands and rectory in a religious house will afford no exemption, if the tithes were in lease at the time of the dissolution.

Tithes not separated from the rectory by a lease for years of them.

Tithes were granted by the crown with other possessions of an abbey, and the grant stated the premises to be of a certain value, as mentioned in a particular, but that particular did not include the value of the tithes: the tithes nevertheless passed.

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M. 17 Ja. A. D. 1619. B. R.

Earl of *Clanrickard* v. Lady *Denton*. [MSS. (c) Turnor.]

The exemption from tithe of wood in the *Weald* of *Kent*, how proved. 2 Ro. Rep. 122. S. C. Palm. 37. S. C.

THE earl of *Clanrickard* was plaintiff in a prohibition, and lady *Denton* widow was defendant: the case was as follows: Lady *Denton* being proprietrix of the impropriate parsonage of *Tunbridge*, which parsonage is within the ancient precinct well known and called by the name of the *Weald* of *Kent*; and the earl of *Clanrickard* being seised in right of *Frances* his wife of several coppices within the above parish and within the precinct of the said *Weald*, the earl fell several of the coppices, and lady *Denton* libelled against him in the spiritual court for the tithe of fellable and saleable wood, that is, for the underwood of those coppices. The earl came into this court, and suggested that there is an ancient precinct called by the name of the *Weald*; within which precinct there are divers parishes; and that within that precinct, the parish and the place where the present question arises are situated, and that through all that precinct from time whereof the memory, &c. there has been a custom that all owners and proprietors of any coppices or woods shall be discharged of tithe for all manner of wood; and thereupon he prayed a prohibition, which was granted. And lady *Denton* joined issue with him, that there was no such custom; and there was a trial at bar upon this issue or custom, in which the right of the custom was not to be debated, to wit, whether it were a good custom or not; but whether there were such a custom *de facto* or not. And on the part of the plaintiff to prove the custom this evidence was given. Witnesses deposed, that through several parishes within this precinct they had seen several coppices fallen, and no tithe paid for them. And for this the testimony of those who had bought the wood of these coppices was thought the more proper; for the buyer is to pay the tithe, and not the seller. And the general testimony of others, who said they had not seen any tithe paid, was not thought material, being merely negative. Note, in this case the testimony of all those, of whatsoever condition or reputation they were, who were entitled, either as owners or farmers to any wood within the *Weald* of *Kent*, was rejected: for the custom

(c) This case is extracted from a manuscript book of reports in the collection of Mr. *Hargrave*: the book was written by Mr. *Arthur Turnor*, whom we have already mentioned, supra 165. He was the father of Sir *Edward Turnor*, who was made chief baron 23 May 1671, and who had been speaker of the house of commons.

being

being alleged to be general through the whole *Weald*, though they were not parties to the suit, yet, for that the custom concerned them in their private profit and in this immunity, they were *quasi* parties, and their testimony *quasi in propria causa*. As in the case of a common, if the right be alleged in a whole vill, though the suit be between particular persons, yet none of those who claim common under the same prescription shall be admitted to give evidence. So, in the case of a *modus* laid in a whole vill: for those within the vill are parties in interest, though not to the action. So, in disproof of the custom, the evidence of any person who was owner, proprietor, or farmer of a parsonage, was rejected. They also shewed, that upon the like suggestion for the like custom in the *Weald of Sussex* (p), which adjoins to the *Weald of Kent*, a verdict had found the custom. And in * *Sir Moyle Finch's case*, where the issue was upon the custom in the *Weald of Sussex*, after full evidence, the custom was so strongly proved, that the plaintiff was nonsuited. But for aught that appeared to the contrary, this was the first trial of this custom in the *Weald of Kent*.

* In C. B.

But for the inducement of this custom; that it was good *de jure*, the plaintiff's counsel offered these reasons. 1. They said, that before the constitution made at a council held in 17 E. 3. under *John Stratford* then archbishop of *Canterbury*, no tithe was paid for any wood. And this canon or constitution is recited by *Lindwood*, (who made a collection of the canons in the provincial councils), in his 3d book fol. 189. cap. *Decima de silvis caduis*, &c. and in the preamble of the canon it is recited, that people were then in the custom of paying no tithe of *silva cadua*; but the canon only declares what shall be accounted and reputed *silva cadua*: and from the preamble they inferred, that it proved, that people were not in the custom, prior to that time, of paying any tithe of wood. They then cited the several petitions in parliament by the commons in the following year, mentioned by *Selden*, c. 8. 237, 8. which prove, that the commons conceived themselves to be aggrieved by being compelled to pay tithe of wood. And in *Doctor and Student*, c. 155. it seems that tithe of wood was not antiently paid; but when parsons demanded the tithe of all wood, then the statute of 45 E. 3. was made, which though not so large as the common law, yet does not restrain the common law; so that if a prescription at

(p) According to *Palmer*, the issue upon the custom in the *Weald of Sussex* had been tried the year before in B. R. And the like custom had been found in the *Weald of Surrey* upon two trials in C. B. and B. R.

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common law to be discharged of tithe of wood were good, it will still remain good, for there is no law against it, nor does the constitution, if it be received, enact the contrary. *Dodderidge J.*—The intention of the constitution was only this: all wood being either timber or underwood, which is called *silva cadua*, and no tithe, it seems, having been paid for timber, but only for *silva cadua*, the canon declares what wood shall be deemed *silva cadua*. But *Selden* told me, that before this constitution of 17 E. 3. by the canon law, tithe of wood was without doubt payable: but those canons were not received and incorporated into our law, and canons are of no power unless they are received and allowed by our law; so that it seems by the old common law tithe was not paid of wood. And as it seems to me, in the several statutes made in the time of E. 3. recited in *Selden*, fo. 238, 9, &c. there is no enactment at all for the payment of tithe of wood: but it is only enacted by them, *que soit fait, come ad etre use devant*. And in divers places, as it seems, no tithe had been used to be paid for wood; so that if this usage continued in any place *de non decimando* for wood, such place will be discharged by law of that tithe at this day. And *Selden* thought that a prescription *de non decimando* might be good at this time: for the opinion of *Choke* in 8 E. 4. that a prescription *in non decimando* is not good, is the first authority in our law for that doctrine, and from whence he had it, appeareth not; and since that time his opinion hath been received and continued; but perhaps, if it were examined, it would be found to be but an error.

But the particular reasons for this custom to be discharged of the tithe of wood in the *Weald of Kent* were these: 1st. This is not a prescription in any particular man or place, but it is a custom through this whole precinct; and in *Doctor and Student*, c. 54. a whole country may prescribe to be discharged of tithe of wood. 2. As this precinct of the *Weald* was formerly so overgrown with wood that the parsonages were of small value, and their profits were much increased by the cutting down of the wood, and converting the land to tillage, it may therefore be presumed, that there was a general agreement made by the clergy in respect of this, to discharge it of the tithe of wood. 3. In former times, there was such plenty of wood, that it was of no value, and the tithe not worth taking, and thence possibly the custom of not paying any tithe for it. And this custom had continuance till of late years, when wood began there to be of value. And it is conceived that the value in the present case has raised the question.

In this case lady *Denton* had also libelled for the tithe of hay in a meadow within this parish: whereupon the earl suggested for a prohibition, that this was parcel of the priory of *Tunbridge*, and that this priory and all its possessions came to the king, and were vested in the king by the statute of 31 *H. 8.* and he recited the clause of discharge in the statute; and farther alleged, that the prior and his predecessors from time whereof, &c. and at the time of the dissolution, held this land discharged of the payment of tithes, and he made title to the land. Issue being taken on the prescription of discharge in the priory, it appeared in evidence that this priory was of the order of *Cistercians*, and that they held their lands discharged of tithes *dummodo propriis manibus aut sumptibus excolebant*: but that their farmers had paid tithes. So that upon this issue of an absolute discharge it was found against the plaintiff in the prohibition, and a consultation was awarded. And now in the spiritual court, *addendo* to the former libel, there is an article, that though the prior and his predecessors from time whereof, &c. held this land discharged of the payment of tithes, (*quod non fatetur*), yet for these sixty, fifty, forty, thirty, twenty, or ten years last past, tithes have been received and paid in kind for the land; and so by this trick, though this land was discharged in manner above mentioned and by law; yet, by reason of this payment afterwards, they asked sentence in favour of the parson. And so here there is an enlargement or change of the libel; and therefore upon the statute 5 *E. 3. c. 4.* the defendants moved for a new prohibition; for the original libel is in common form, and now in that which is filed an addition (though the canonists say, that that which is filed an addition is in truth but an illustration of the former libel) there is a pretence of payment since the dissolution, and upon this payment, if it be proved, they pray sentence for the parson. And there was a great debate, whether this addition in the spiritual court after consultation granted was an enlargement, or alteration of the former libel; and this court being of opinion that it was, the counsel for the plaintiff in the spiritual court agreed to wave these additions, and to proceed solely upon the old libel: so no prohibition was granted. But *Doddridge J.* said, if this land was discharged of tithes in the hands of the prior, and the priory was vested in the king by the statute of 31 *H. 8.* so that such discharge as was in the priory ought by the law to remain, though tithes have been paid ever since the making of the statute, and they therefore pray sentence for the parson, yet a prohibition shall be granted

2 Ro. Rep.
207. Palm.
37. S. C.
A prohibition is grantable after a consultation has been awarded, if there be any material additions made to the libel.

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granted after sentence : for by law this land was discharged of tithes ; and this constant payment ever since the statute (admitting it to be so) does not make it chargeable by the laws of the realm ; and, therefore, if their sentence be contrary to the law of the realm, a prohibition ought to be granted.

M. 17 Ja. A. D. 1619. C. B.

Canning qui tam, &c. v. Jones. [MSS. Turnor.]

If a parson has two adjoining benefices, one of which has a house, but the other has not ; and he resides in a house in the latter parish, at a small distance from the parsonage-house in the other parish, which parsonage-house he does not let out, but occupies with his servants and goods, Qu. Whether he be liable under the statute for non-residence in the parish which has the parsonage house?

UPON an information exhibited by *Canning* against *Jones* upon the statute of 21 H. 8. c. 13. for non-residence upon his benefice by the space of 11 months, a special verdict was found to the following effect : The parish of *All Saints* and the parish of *St. Andrews* are situated close together, and the houses of each are intermixed one with the other, and the churches are divided from each other only by a high road. *Jones* was presented to the church of *All Saints*, and admitted, instituted, and inducted thereto, and there being in that parish only a cot and no parsonage-house, in which any hospitality could be kept, he repaired it and put it into a better plight than it was, though having only one room, and that next to the ground, it was unfit for habitation. *Jones* was afterwards presented, admitted, instituted, and inducted to the church of *St. Andrews*, in which parish there was a convenient parsonage-house, and he built there a barn, and kept it in good repair, and put all his provision in it, and held the house in his own hands, and his servants slept in it, but he himself resided in another house, which he had in right of his wife, but four poles distant from the parsonage-house, and situated in the parish of *All Saints*.

Henden serjeant, for the plaintiff insisted that this was non-residence within the statute. The first point he made was this: The parson of *Dale* resides in another house within his parish, and not on his rectory, that is, in his parsonage-house : the question is, whether this be a non-residence within the statute ? And I say that it is. Both the canon law, and the common law, before the statute of 21 H. 8. prescribed to, and required of, every incumbent upon institution an oath for his residence *super rectoriam*, if it was a rectory ; and if only a vicarage, *super vicariam* ; and in case he did not reside there, he used to be cited to the ecclesiastical court *pro lapsione fidei*. There was a canon also requiring the parson to use hospitality and to repair the parsonage-house ; by which canon I conceive that the

the intention of the oath was, that he should reside in the parsonage-house, and not merely in the parish. And the statute of 21 H. 8. seems to be but a confirmation of the canon and common law, and only to superadd a penalty in case of non-residence. The words of the statute are, "shall be resident and abiding in, at, and upon, his benefice," which shall be intended in his parsonage-house, if it is habitable. In 34 Eliz. B. R. *Brown and Hudson's* case, the parson resided in another house within his parish, and not in the parsonage-house; and it was resolved to be a non-residency. [But *Winch J.* said, that the fact in that case was, that he resided in an adjoining parish.] In 8 Jac. C. B. (q) *Canning*, the now plaintiff, informed against one *Newman* for non-residency: and in that case it was found by a special verdict, that the parsonage-house was convenient, and that the parson resided in another house in his parish: and it was agreed by *Coke C. J. Warburton* and *Foster J.* to be a non-residency, though *Walmesley* argued to the contrary: but the informer was allowed to compound the matter, and a composition was accordingly made, and no judgement was entered. In 6 Rep. 21. it is held to be non-residence. 7 E. 6. Dy. 234. cites 29 Aff. if rent is granted to be perceived of a college or abbey, the site only is charged; and a college shall be taken only for the site of it, and not for every thing appertaining to it: so here, "benefice" shall be construed to be the parsonage-house, and not the whole parish; and this was said in *Newman's* case. The second point was, an incumbent has two benefices adjoining to each other; and in the one benefice there is no house that is habitable; and in the other there is a convenient house, but the incumbent resides in a house in his other parish: the question then is, whether he shall be said to be non-resident in the parish where he has a house. And I contend that he shall. It is true, that if a man has two benefices, in each of which there is a parsonage-house, he may reside in which of them he will by the express words of the statute, and shall not be said to be non-resident in the other: but, if a man has two benefices, and in one of them only there is a house, and he reside in a house within that parish which

(q) See a very indistinct report of this case in 2 Brownl. 54. The facts of the case were these: "Dr. *Newman*, the defendant, was rector of *Staplehurst* in *Kent*, and was also seised of a house in *Staplehurst*, situate within twenty yards of the rectory-house: it was found that the rectory-house was in good repair, and that the Dr. held it in his own occupation with his own goods, and did not let it to any other, but that he resided himself in his own house, and not in the rectory-house."

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has no parsonage-house, he shall be said to be non-resident in the parish where he has a parsonage-house.

- *Atlow* serjeant, for the defendant.—The first point which has been made is, whether, if the parson reside in another house within his parish, and not in the parsonage-house, this shall be said to be a non-residence within the statute? It has been objected, that the statute of 21 H. 8. is but a confirmation of the canon law, which was also the common law, being received and incorporated into it; and that the canon law requires an oath upon the institution of the incumbent for his residency *super rectoriam*. If this be true, then we are to consider how the canonists construe the words "*super rectoriam*." And unquestionably, it is clear that by their law this is not a non-residency. For, by their law, if the parson serve his cure, and be inhabitant among his parishioners for hospitality and his good example in life, though he does not reside in the parsonage-house, yet he has fulfilled his oath, and is resident. This therefore is the construction which the canonists put upon the words "*super rectoriam*" in the oath; and if the statute be but a confirmation of the canon law, it must be expounded according to it. But the real doubt is, if this word "*benefice*" in the statute of 21 H. 8. has so restrained the incumbent at this day, that it is not now sufficient for him merely to be inhabitant with his parish; but that he must also reside in the parsonage-house, else he will not be resident according to the intent of the statute. And I think that it is a sufficient residence within the statute, if he reside in the parsonage, though not in the parsonage-house. As to the authorities that have been cited against me, I answer, that the first case does not apply, because there the parson resided in *another* parish. In the second case there was no judgement, but perhaps a sudden opinion, which might be altered. And as to *Goodall's* case in 6 Rep. (with reverence to the book), I know that no judgement was ever entered up in that case*: so that the present case comes now for judgement clearly and without any authority the one way or the other. I will therefore examine the statute of 21 H. 8. and thereupon consider the preamble, the body, and the proviso in the statute. 1st. Taking the preamble of the statute, it is in our case fully satisfied; the cure is served, hospitality kept, and example in living given by the defendant's dwelling within his parish among his parishioners: and it is found too that the parsonage-house is in good repair, so that there is no mischief. 2dly. Taking the body of the statute, that is not infringed in our case: the words are, "*but absent himself wilfully, &c. and make his residence*"

* Vide
supra 204,
note.

residence and abiding in any other places, &c." which shall be construed, and shall imply the statute to mean, a wilful absence from his cure and parish. And if the construction is to be, that the statute means residence in the parsonage-house only, in that case, if there should be no parsonage-house, the incumbent might be non-resident; which construction would give great liberty to non-residence, for there are many places where there is no parsonage or vicarage-house. But I conceive that though there should be no parsonage-house, yet the incumbent is bound to reside upon his benefice, if he can have any other convenient house within his parish: so that the word "benefice" in the body of the statute shall not be restrained to the parsonage-house. 3dly. The last proviso in the statute explains that the statute does not intend to confine the residence to the parsonage-house; for it gives liberty to the parson to take in farm any dwelling-house in any town for his habitation; which, according to my construction, must mean, that within his parish any parson may elect his dwelling-house. For if this were to be construed to mean a parson only who had no parsonage-house, then the proviso would have been particularly penned, namely, that any parson, *having no parsonage-house*, may take to farm, and would not have been general, as it is. I will also examine this statute by other statutes. I will take the statute of 13 *Eliz. c. 20.* of leases. Which statute well explains what construction is to be made of the word "benefice:" for by this statute an incumbent may lease his benefice, which is to be understood of the whole, as well the parsonage-house, as the rest; but such lease shall remain in force only while the lessor shall be resident, and serving the cure without absence above 80 days. If then the 13 *Eliz.* intends that the parson may lease all his benefice, namely, the house, glebe, and tithes, and that yet he may be resident; it does not restrain residence to be to the parsonage-house; for he cannot reside in it against his own lease; and, therefore, if he reside in any other house within his cure, the statute will be satisfied, and he shall be said to be resident. I will mention the case of the parson of *Euston* in *Suffolk*, upon evidence before lord *Coke* as judge of assize: in that case, the parson had made a lease of his parsonage-house to one *Ruckwood*, and the parson resided in another house within his cure, and would have afterwards avoided his own lease under the statute of 13 *Eliz. c. 20.* upon the ground of non-residency, *viz.* that he had been absent by the space of 80 days, &c. from the parsonage-house: and lord *Coke* over-ruled it upon the evidence, and held that it was not a non-residence within the statute, and would not

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permit a special verdict in the case. And if the statute of 13 *Edw.* does not confine residence to the parsonage-house, which statute is for the advantage of the parson, and to the disadvantage of his lessee; this statute of 21 *H. 8.* which is penal upon the parson, shall not be construed to restrain residence to the parsonage-house, and to take the word "benefice" so strictly; for penal statutes are not to be construed strictly, 31 *H. 8. Dy. 22.* In the last place, the oath, which was to be taken by every incumbent, shall not be construed to restrain residence to the parsonage-house; for the oath is to be taken upon institution, when the parson has nothing to do with the house, for before induction he has not the temporalities. If then residence be restrained to the parsonage-house, this will open a gap to non-residence: for if a presentee is admitted and instituted, and will remain so without taking induction, so that he has nothing to do with the house; by this construction, such an incumbent might be non-resident. There is no judgement in point, and therefore the present question comes clearly and without foil for the judgement of the court.

As to the second point, the case stands thus: The information is brought for non-residence in the parish of *St. Andrews*; and it is found that the defendant resides in a house in the parish of *All Saints* (of which he is also parson) on his own land, and that within that parish upon the matter there is no parsonage-house; for it is found that there was no house upon that benefice when he came to be incumbent, but only a ruinous barn; and it is also found that his parsonage-house in the parish of *St. Andrews* is not distant quite the space of an acre from the house in which he lives, though they are in different parishes; and that the defendant keeps this parsonage-house in his own hands, and applies it to his own use, namely, to lay corn in, and to lodge servants, though his own habitation is in the other house. Surely, this cannot be said to be any non-residence in this parsonage-house; for this house and the other in which the defendant himself lives, are now as one house; and it is found that the parsonage-house is well repaired: and by the use of that house with the other, the defendant's habitation is enlarged, and made more convenient for hospitality. Nor do I agree to the position, that if an incumbent has two benefices, upon one of which there is a house, and upon the other none, that he is bound to reside upon that benefice where there is a house; but I think that he may, if he pleases, reside in any house upon the other benefice.

Hebart

Hobart C. J. advised the counsel to search for precedents; but he said that it would be difficult to match the case. *Adjournatur.*

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The case was afterwards argued *M. 18 Ja.* by *Bawtrey* serjeant, for the defendant.—This is not a non-residence, either within the words or the intent of the statute. It is not within the words, for there is not one word of a parsonage-house in the statute; and it would have been an easy matter for the makers of the statute to have mentioned the parsonage-house, and to have appointed that the parson should be resident in it, if they had meant that the statute should extend to it. The words are, that he shall be resident at, in, or upon his benefice; so that we must examine what shall be said to be his “benefice.” By our law the word “benefice” contains and comprehends within it, the church, the glebe, the tithes, the spiritual charge and function; and the civilians agree in this description of the signification of the word. A bishop may be said to have a benefice, and that shall be intended of his whole diocese; and so a parson has a benefice, and that is his whole parish. It is all one as if the statute had said in this case, that he shall be resident at, in, or upon his parsonage: the word parsonage could not have been construed to be intended of the parsonage-house; for parsonage and parsonage-house are not all one, nor are they convertible terms; for then they must be co-extensive. There is as great a difference between parsonage and parsonage-house, as there is between manor and manor-house; and if there be lessee for life of a manor, and the lessee have covenanted to dwell in or upon the manor; there, if he reside in any house within the manor, it is sufficient, and the covenant is performed, though he do not reside in the manor-house. This, therefore, is not a non-residence within the words of the statute. Neither shall it be said to be a non-residence within the intent of the statute. It has been objected, that the exposition which has been made of the statute is, that the parson must reside in the parsonage-house; that so it was resolved in *Butler’s* case, 6 *Rep.* and that this shall be taken by equity to be within the statute. I answer, that in *Butler’s* case there was no judgement given, as I am informed; but that there was a difference of opinion in it; and that is the only authority against me; and therefore, notwithstanding the exposition there, the present case comes clearly and without foil for judgement. It has been objected, that the statute extends to, and is intended for, the maintenance of the houses and habitations of the parsons, &c. which

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will be neglected if the parson do not reside in the parsonage-house. I answer, that the parsonage-house may well be maintained in his absence, and though he himself should not reside in it; as the lessee for years, or for life, is bound by law to repair, and yet the law does not oblige him to reside in the house. It is as bad an argument or consequence that because the parsonage-house must be repaired by the parson, therefore he must abide in it, and be resident in it; as it is to say, because he is resident in the parsonage-house, therefore it is maintained by him. It will be a long gradation to bring this within the intent of the statute, namely, the statute intends the maintenance of the house, and the maintenance of the house intends residence in it; so that there will be intendment upon intendment to bring this within the statute. And if the parson shall be said to be non-resident, if he do not reside in the parsonage-house, because that shall be said to be neglect of the maintenance of the house; by the same reason then, if he reside in the parsonage-house, and do not maintain and repair it, he shall be said to be non-resident. And the parsonage-house is chancel, not the principal part of the possessions which the parson ought to repair. But the serving of the cure is the principal thing aimed at by the statute, and to which it wished to bind the parson. It does not intend to make any provision for the temporal possessions, or the maintenance of the houses, for the law had already provided for that. And every thing which the statute has provided for enforces the opinion, that it aimed only at a provision for serving the cure. If the statute had intended to bind the parson to reside in the parsonage-house, it would have provided, that if there be no parsonage-house, he shall not be bound to residence. But it will be said, that such a provision would have been needless; for the law would make that exception in his favour, and excuse his residence if there were no parsonage-house. I answer, that the statute has provided for things quite as unnecessary, in order to explain its intent: as, that spiritual persons beyond the sea in the king's service shall not by that statute be non-resident; and yet unquestionably, without such a provision, the law would have excepted such persons. So of the proviso in the 31st clause, which excepts a parson out of the clause of non-residence, where there is a vicar endowed: for though the statute excuses him from residence, yet it shall not be construed to excuse him from the maintenance and repair of his house; for he will be still chargeable for dilapidation; and therefore residence
and

and dwelling shall not be confined to the parsonage-house. Besides, *residence* by the statute is opposed to *absence*; and *absence* by the statute must be absence from the cure and the parish; so that he will be resident within the statute, if he reside in any part of the parish. And subsequent statutes shew that this statute had no eye to the temporalities. Thus the statutes of 28 H. 8. c. 13. and 33 H. 8. c. 28. which were made with reference to or in explanation of the statute of 21 H. 8. shew, that the visiting and instruction of his cure and charge is the thing provided for by the statute of 21 H. 8. Indeed there was no occasion for that statute for the maintenance of the houses; for parsons are punishable at common law for the decay of those; 4 E. 4. they are deprivable for it; but there was no punishment for neglect of the cure, nor any obligation to the serving of it, but the obligation of conscience. Besides, after the statute of 21 H. 8. the parson had power to lease the parsonage-house until the statute of 13 Eliz.: and if he had power to lease, he could not be bound to be resident in it. Before induction too the parson has not the temporal possessions, nor any thing in them, and yet by institution he has the cure and charge: but, if this construction be admitted, though he has the cure, he shall not be bound to residence until he has the temporal possessions. It has been agreed, and objected, that it is a construction from the intent only of the statute which makes residence in the parsonage-house to be within the statute. It may be well answered, that a penal statute, as this is, shall not be taken by equity. *Pl. Comm. Partridge and Croker's case* is, that penal statutes, where there are not words to warrant it, shall not be taken by equity. If then a man has two parsonages, and one has a house upon it, and the other has not; he shall not be bound to residence upon that benefice where the house is, for his election shall not be taken away on that account. 10 Rep. 138. and 5 Rep. 51. *Laughter's case* prove this.

[*I have not been able to discover what was the final resolution in this case, nor to trace it any further.*]

M. 17 Ja. A. D. 1619. B. R.

Wood's case. [MSS. Calthorpe.]

A surmise in a prohibition that the lands lie in a different parish than that which the libel supposes, need not be proved within the time limited by st. 2 & 3 E. 6.

A PROHIBITION being granted in the case of one *Wood*, upon a surmise that the lands, whereof the tithes were demanded, lie in a different parish than that which was supposed by the libel, *Bridge-man* moved for a consultation, because the surmise was not proved within six months according to the statute of 2 & 3 E. 6. But a consultation was refused; for this being a surmise upon which a prohibition was grantable at common law, and being neither a surmise upon a modus, nor upon a prescription to be discharged of the payment of tithes, need not be so proved.

M. 17 Ja. A. D. 1619. B. R.

Congley v. Hall. [2 Ro. Rep. 125.]

A surmise that the lands were discharged before and at the time of the dissolution of the monastery by reason of unity of possession, must be proved within the time limited by st. 2 & 3 E. 6.

IT was surmised, in order to have a prohibition to a libel in the spiritual court for tithes, that the abbot and all his predecessors before and at the time of the dissolution held the land discharged of tithes by reason of unity of possession. *Calthorpe* moved that this surmise need not be proved within the statute of 2 & 3 E. 6. for that statute does not require the surmise to be proved unless the cause be determinable in the spiritual court for non-proof of it, and this case is not determinable there by the express words of the statute. [*Quare hoc*, for I do not understand him.] Besides, it is impossible to swear that the land was discharged of tithes for the infinite search of records that must be made before that can be known, and also for the infinite compositions and other causes of discharge; and for that reason the general allegation of unity of possession shall be sufficient without shewing how it was, as appears from the *Archbishop of Canterbury's case*, 2 Rep. But the court were against him; for though precise proof cannot be made, yet the party may swear that it has been ever since the statute of 31 H. 8. reputed to be discharged by unity, or that he has heard it commonly to be so, or the like. And *Dodderidge* said, that he had known several precedents in this court of proof made in that manner.

M. 17 Ja. A. D. 1619. B. R.

Linge v. Gunter. [MSS. Calthorpe.]

A PROHIBITION having been granted upon a surmise of a *modus decimandi*, pending that surmise in plea, and before the trial of it, the parson libelled for tithes in kind of the same lands for another year; and upon an affidavit being made thereof an attachment was granted. For it was a contempt of court to proceed in the spiritual court for the same tithes, before the prohibition was tried. In *F. N. B.* 71. if the lord distrain for rent arrear at another day than that for which the first distress was made, pending the plea of *hors de son fee*; the tenant shall have a recaption, because the lord's title is to be tried; and upon that recaption the lord shall be fined. And an order was made, without any prohibition being granted, to stay the proceedings in the spiritual court upon the libel for these tithes,

Pending a suit in prohibition upon suggestion of a *modus*, there can be no suit in the spiritual court for tithes subsequently accrued.

H. 17 Ja. A. D. 1620. B. R.

Johnson v. Bois. [MSS. Calthorpe.]

A PROHIBITION being founded upon a surmise, that a great liberty within the county of *Surrey* had been discharged from the payment of tithes time whereof, &c. a consultation was awarded: for a prescription *in non decimando* is against common right; and though the *Weald of Suffex*, or an entire country may prescribe *in non decimando*, yet such prescription cannot be allowed to a particular liberty, of what extent soever it may be.

A *bertry* cannot prescribe *in non decimando*.

H. 17 Ja. A. D. 1620. B. R.

Porter v. Bathurst. [2 Ro Rep. 142.]

IT was found by a special verdict in prohibition, that the abbey of *Robertbridge* was of the order of *Cisterians*, who, by reason of their order, were discharged of the tithes of all their lands *dum in propriis manibus existunt*: that the abbey was dissolved by the statute of 31 H. 8. and that the land now in question was at the time of the dissolution leased for years by the abbot, and that at that time also the lessee paid tithes: that the lease afterwards expired:

Though lands belonging to a *Cisterian* abbey were in lease at the time of the dissolution, and the lessee then paid tithes, yet that will not deprive

1620. that the land was conveyed to Sir *Henry Sidney*, and from him descended to the earl of *Leicester*, who in the 7th of *Ja.* sold it to *Porter*: that the rectory of *L.* in which vill the land is situated is appropriated to the dean and chapter of *Rocheſter*, who granted a lease of it to *Bathurst*, and he libelled in the court christian against *Porter* for tithes, who upon the above matter obtained a prohibition.

the owner of
the inheri-
tance of the
privilege of
exemption.
Cro. Ja.
559. Palm.
228. S. C.

Anſcombe argued for the plaintiff, and ſaid that this is a perſonal diſcharge in reſpect of the order of *Ciſtertians*, as was agreed in 11 *Ja.* in *C. B.* in *Boyer's caſe*; and though a perſonal privilege ſhall not be transferred by the general words of a ſtatute, as appears by *Ingleſfield's caſe*, 7 *Rep.* and in the *Marquis of Wincheſter's caſe*, 3 *Rep.* yet it may be by ſpecial words, as here in our caſe it is enacted by the ſtatute of 31 *H. 8.* that “the king ſhall have, hold, &c. the lands, &c. as free and abſolute as the abbots, &c. held and had them:” by reaſon of which words, though the privilege is not conſtant and continually in being, but only when the lands ſhall be in the hands of the abbey, yet the king, and thoſe claiming under him, ſhall be diſcharged of tithes. But it may be objected, that the words of the ſtatute are, that “the king ſhall have, &c. as free, &c. as the abbot had and held them;” and here in our caſe the abbot could not be ſaid to have them, in aſmuch as the leſſee of the abbot paid tithes. I anſwer, that the abbot held the inheritance diſcharged, though the leſſee paid the tithes; and the ſtatute hath reſpect and conſideration to the inheritance, and not to the particular eſtate; and one may be ſaid to have and to hold, though he have only a right; as a diſſeiſee ſhall be in ward by reaſon of his tenure. And as to the *Archbiſhop of Canterbury's caſe*, 2 *Rep.* where it is holden, that if the leſſees or the farmers paid tithes at the time of the diſſolution, that ſhall not be ſaid to be a unity of poſſeſſion, which muſt be conſtant and perpetual, as 11 *Co.* *Priddle and Napier's caſe*; that does not apply; for the preſent is a caſe of a perſonal diſcharge. *Quod fuit conceſſum* by *Montague C. J.* *Dodderidge* and *Houghton J.* And *Dodderidge* ſaid, that it was agreed (a) in *Boyer's caſe*, before cited, that the lands which belonged to the Hoſpitaillers are diſcharged of tithes, though they were in lease at the time of their diſſolution; and yet they were not diſſolved by the ſtatute of 31 *H. 8.* but by a ſpecial ſtatute made in 32 *H. 8.* And *Montague C. J.* ſaid, that there are other words in the ſtatute of 31 *H. 8.* viz. that the king and all others claiming under him ſhall hold according to their title, and ſhall hold the land diſcharged of tithes; and here in this

(a) Vide
infra Sir W.
Jones's Re-
port of the
caſe of
Whitton
and Weſton.

case *Porter's* title is derived out of the inheritance, which the abbot had discharged of tithes, and therefore *Porter* shall have it discharged also.

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P. 18 Ja. A. D. 1620. B. R.

Sir Edward Coke's Case. [2 Ro. Rep. 161.]

IN a case between the lessees of *Sir Edward Coke* and the earl of *Warwick*, it was agreed by the court and the counsel for both parties, that if one has a portion of tithes out of a rectory, and afterwards purchases the rectory, that by this the portion of tithes is not extinct, but remains grantable. And *Houghton J.* gave this reason for it, viz. for that the portion of tithes might be more ancient than the rectory, and that the rector of ancient time had no title to the tithes; for before the council of *Lateran*, every one might pay his tithes to whom he would. And *Montague C. J.* said, that it was a position in the time of king *John*, that one ecclesiastical and spiritual man shall not pay tithes to another ecclesiastical man, for *ecclesia ecclesie decimas solvere non debet*; and the case at bar was the case of an ecclesiastical person, viz. of a prior who had the portion of tithes, and also the rectory.

A portion of tithes will not become extinct by vesting in the same hands with the rectory.

In this case *Coventry* said, that it was affirmed in *Barfdale* and *Smith's* case that where a vicarage was endowed *de omnibus decimis garbarum*, that that includes hay: and all the judges said, that that case was aided by a custom, viz. that the vicar had always after the endowment used to have tithe-hay, and that was the true case.

Supra 207.

M. 18 Ja. A. D. 1620. C. B.

Wright v. Gerrard and Hilderham. [Hob. 306.]

THE plaintiff declares in prohibition, that *Richard Stouden* the last prior of the monastery of *Hatfield*, and his predecessors were, time out of mind, seised as well of the rectory of *Hatfield*, as of a certain farm there called *Downhall Farm*, in his demesne as of fee, and by reason thereof did enjoy the said lands discharged of tithes; and then recites the statute of 27 H. 8. for dissolution of abbies, and that the said priory was under two hundred pounds *per annum*, and that by virtue of that statute king H. 8. was seised, *simul et semel* of the said parsonage and lands discharged of tithes; and that the abbess of *Barking* was seised of the manor of *Littington*,

Monasteries which came to the crown by the statute of 27 H. 8. are not within the privilege of 31 H. 8. and therefore where the prior of *Hatfield* was seised of lands and a rectory time immemorial in right of

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the priory which was dissolved by 27 H. 8. and the king held the priory in his hands for a year, and then in 28 H. 8. granted it to the abbey of *Barking*, which was dissolved by 31 H. 8. and the lands and rectory were afterwards severed; the lands are not entitled to the benefit of the statute of 31 H. 8.

1 Jon. 2.
Cro. Ja. 607.
Winch's
Entr. 642.
S. C.

and she so seised, *Nov. 3d, 29 H. 8.* conveyed the manor of *Litlington* to *H. 8.* and king *H. 8.* conveyed the said lands, called *Downhall Farm*, and the said rectory to the abbess of *Barking*; by virtue of which conveyance she was thereof seised, (and then speaks not of the discharge of tithes), and *14th Nov. 31 H. 8.* she surrendered them again together with the whole monastery to *H. 8.* and then recites that one only clause of the statute of *31 H. 8.* for the enjoying of abbey lands discharged of tithes; and that by force of the grant of the abbess of *Barking* and of the said statute *k. H. 8.* was seised of the said lands discharged of tithes: and he being so seised granted the same to *William Barns*, and others; and brings down the title of the land to one *Glascocke*, and the plaintiff by lease; and then recites the statute of *32 H. 8.* and *2 E. 6.* that none should be compelled to pay tithes for lands discharged of tithes, and that though the said farm and lands were discharged of tithes, &c. that yet the defendants sued *Glascocke* and him for tithes, &c. that *Glascocke* died, hanging the suit there, and that he pleaded *et supra* there, &c.

Whereupon the defendant by protestation denying the unity by prescription in the prior of *Hatfield*, demurs upon the declaration, and prays consultation.

The plaintiff joins in demurrer, and prays that no consultation be granted. It seems his prayer should be, that the prohibition should stand. But either is well enough.

The case in short is thus. The prior of *Hatfield* and his predecessors, time out of mind, were seised of the parsonage of *Hatfield*, and a farm in the same parish, called *Downhall Farm*, together.

The priory being under two hundred pounds *per annum*, was given to the king by the statute of *27 H. 8.* the king gives the parsonage and farm to the abbess of *Barking*; the abbess surrenders all to the king. The question is, whether the king and those that claim under him shall hold this farm discharged of tithes, by force of the perpetual unity?

And it was adjudged against the plaintiff, and a consultation granted, by the uniform consent (a) of all the judges.

This

(a) It appears from Sir *William Jones's* report of this case, which is adopted by *Crake*, that this judgement was not given with the uniform consent of all the judges; for that Mr. Justice *Warburton* differed from the other three judges; and held, that appropriations were not given to the king by the statute of *27 H. 8.* and that to supply that

This case doth consist of two great points, as they arise in order of time.

The first great point is, whether as this case is, and as it is pleaded, this land ought to be discharged of tithes, though it had come to the king only by the statute of 31 H. 8. that is to say, that it had never come to the prioress of *Barking*, by reason whereof and of her surrender it was vested in the king by the statute of 31 H. 8. The first great point.

And I am of opinion, that in that case they had not been discharged.

The second great point is, whether upon the whole matter, and the consideration of a double means whereby it came to the king, viz. by 27 H. 8. from *Hatfield*, and by 31 H. 8. from *Barking*, and upon consideration of both these statutes, this land ought to be discharged by this unity of tithes. And I am of opinion that it is not discharged.

Now the first great point I subdivide into four petty points, which all conclude to the judgement of the first great point.

First, whether the appropriation in this case came to the king, and remained in him a parsonage appropriated by force of the statute of 27 H. 8. only, as well as the like appropriations did by the other statute of 31 H. 8.

And I am of opinion, that it came to the king appropriate, and so remained in him, by force of that statute only: for if it were not so, the appropriation had been dissolved *ipso facto* by the dissolution of that abbey, and so had not come to the king, nor to the abbess of *Barking* from the king, nor from her again to the king.

The second point, whether unity of parsonage appropriate and the land, and having been in a small abbey time out of mind, (as in this case it was), and so coming to the king by the statute of 27 H. 8. only, doth work a discharge of payment of tithes.

And I am opinion that it will not. Wherein we will speak of discharges of tithes in general within that law of 27 H. 8. which stand clear with that law, and which not.

that defect the statute of 31 H. 8. was made; and, therefore, that the appropriations being given by the statute of 31 H. 8. the discharge extends to them. He held also, that the intent of the statute of 31 H. 8. was to give equal discharge to the one as to the other, as well to the land given by the statute of 27 H. 8. as to the land given by 31 H. 8. And that upon that reason was the case of the land of the prior of St. John's of Jerusalem in 10 Eliz. Dy.

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The third point : whether the clause of discharge of payment of tithes, contained in the statute of 31 *H. 8.* can be extended to the small abbeys and their lands, which came to the king by the statute of 27 *H. 8.* only, or not.

And I am of opinion that it cannot be extended to them.

The fourth point, as this case is pleaded, that is to say, repeating only the clause of the statute 21 *H. 8.* that gives the discharge of payment of tithes, without mentioning either the preamble, or any of the other clauses that refer and restrain that statute to those abbeys that came to the king after the 4th of *February*, 27 *H. 8.* which excludes this abbey. So that now this clause may seem as general to the court in meaning, as it is in letter, so that it may comprehend as well those abbeys that came by the statute of 27 *H. 8.* and so before the 4th of *February*, &c. as well as after, whether now the court shall judge upon that clause of the statute of 31 *H. 8.* only, without taking knowledge of the other parts of the said statute, which gives the clause another construction, than by itself alone it should have.

And I am of opinion, that the court shall take notice of the whole statute (though part be omitted material) and judge accordingly. And that therefore if it had not come by *Barking*, and so within the statute of 31 *H. 8.* the court could not relieve it by this clause, as general to all abbeys, by the advantage of the generality of the clause, (as it is delivered in pleading), so this point is handled, as though it had not appeared to come to the king by *Barking*, *scilicet* by 31 *H. 8.* but only by 27 *H. 8.* because as the clause is general, it seems to benefit both alike, as well those that come by the 27 as 31 *H. 8.* though in truth, and upon the consideration of the whole statute of 31 *H. 8.* it doth not so.

Now to the first point, or question of the first great point.

To the first
great point,
the first pet-
ty question
whereof.

It is true, that appropriations are not regularly grantable over, neither can they endure longer than the bodies whereunto they were first appropriate ; whereof the reasons are, because they carry not only the glebe, and tithes, (which they might grant away), but they also give the spiritual function, and make the parsons of the church, and supply institution and induction, which being the highest parts of trust, cannot be estranged, and therefore the instrument of appropriation runs in these words, that they and their successors (not their assigns) shall be parsons, or by *periphrasis* hold the church in proper use. Now yet, by parliament, appropriation may be translated. But the question is, whether the act of 27. gave them

to the king. Against which it is objected, that the statute hath not the word of appropriation; which, in a thing of so singular nature, and so fixed to one certain body, in point of care and function, shall not be taken within the meaning of the law, without some perfect and proper word to carry it.

Secondly, the opinion in the bishop of *Canterbury's* case, *Co. lib. 2. fol. 47.* is objected, that all impropriations had been dissolved upon 31 *H. 8.* if the clause of discharge in that statute had not been. To this an answer hath been endeavoured, that the statute gives to the king their tithes and their land which carry their glebes, which is the whole parsonage say they; but I allow not this answer. For these words may well be taken for common lands; and tithes, for portions of tithes divided from the pastoral charge: for it shall never be understood that the appropriation should be dissolved, and the church made presentative, and yet, by the same statute, both glebes and tithes should be taken from the church, and given to the king. For this were as much as is said of *Julian* the apostate, that he did *occidere, non presbyteros, sed presbyterium.*

But I hold, that appropriations are well given to the king; and that by a word proper enough. For the statute gives (*inter alia*) the churches, chapels, advowsons, and patronages of such monasteries, (which must be understood their churches), as they were in them, either appropriate, where they were so; or their advowsons, where they were not: otherwise it were a mere tautologism. *Fitzh. N. Br. 32. G. ecclesia et rectoria* are *synonyma*; and words of appropriating are, that they may hold *ecclesiam et rectoriam in proprios usus*, as *Grendon's* case is. Again, this statute gives all those monasteries whereof the possession did not exceed 200 l. *per annum*; so whatsoever made to that yearly revenue was meant to be given to the king. And it was notorious, that a great part of their yearly profits did consist in appropriations; for it was easy for them to get advowsons, and as easy to get them appropriate.

Also, it was the clear purpose of the statute to give the king all that those abbies had, and therefore the saving doth exclude the founders, patrons, donors, &c. But, if the appropriation should be dissolved, the giver should be restored to his patronage; and *Priddle's* case, *Co. lib. 11. 13.* says, that appropriations in reputation passed both by the statutes of 27 & 31 *H. 8.*

Also note, that the statute 31 *H. 8.* recites the surrender before made of divers abbies, and *inter alia*, so all their churches, chapels, advowsons,

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vowfons, patronages, (and names not appropriations there), but in the purview gives appropriations by name, *in majorem cautelam*, as being granted before in true meaning; though it is true, that such grants or surrenders without the statute would not have carried appropriations. Therefore by the word "churches," the appropriations were conceived to be granted; and so settled by the statute: and therefore the pleading is, *virtute sursum redditionis præd. ac vigore stat. &c.* For the statute gives not in intent, but vells only, saving this special case, which I note, because it is a singular case.

And upon this I observe further, that all the appropriations of abbies that were surrendered between 27 & 31 H. 8. were *ipso facto* dissolved, with the dissolution of the corporation, and were presentable and might have new incumbents. But as soon as the statute of 31 H. 8. came, the appropriations were restored, and given to the king, and the incumbent ousted.

And touching the opinion before mentioned, I wonder from whence it sprang; for since the body of the statute of 31 H. 8. gives appropriations by name, what needs the other clause for that purpose? and if a bye-clause can do it, why should not the main body? So that conceit is vain.

Second
petty ques-
tion of the
first great
point.

Now to the second point, or question, of the first great point. This statute hath no clause for discharge of payment of tithes, as that of 31 H. 8. hath, neither any thing to give colour to it, other than the clause, that the king shall have the lands, &c. in as large and ample manner as the abbots held the same.

Now there are five ways or means whereby abbey lands are holden discharged of tithes, that is to say, composition, bull or canon, order, prescription of discharge, and unity of possession of parsonage and land time out of mind together, without payment of tithes. Of these five the four first discharges the abbots themselves had, or might have them; but the fifth was no discharge in the hands of the abbots, but it made a discharge of payment of tithes to the king, and those that claim under him by the favourable construction of that clause of 31 H. 8. for so much as that clause extends to; which opinion was long controverted, being confessed of all hands, that it was no full and perfect discharge in law: so then it follows, that these lands can receive no good by this unity, unless they be within the relief of that clause of 31, whereof we shall speak hereafter.

Now

Now of the other four: The first three, that is, composition, bull or canon, and order, were granted and affixed unto the body of the monastery, and were granted unto them as personal privileges, in respect of their spiritual abilities or functions, and their capacity of tithes, and discharge of tithes for that cause: and therefore these had all vanished and expired with the dissolution of the body, if they had not been preserved to the king and his patentees by that clause. But discharge of tithes of the lands of monasteries by prescription is of another nature; for having been always (as prescription presumes) in spiritual hands, the law judgeth that it was never charged with tithe: as the pleading is, that the lands were *immunes a solutione decimarum negativè, non privativè, scilicet*, uncharged, not discharged, as if they had been once chargeable. The reason whereof was, that being spiritual persons, they were able to minister to themselves spiritual rights, and therefore performing *officium*, they might retain *beneficium*. And this non-charge standing upon prescription was inherent to the land, not as a thing given, but as a *non ens*; lands that never yielded tithe, and land of the little monasteries, so free of tithes, the king by the statute 27 H. 8. and his patentees, were to hold free, not by reason of any privilege, which did need to be preserved by any statute, but ever by the grant of the land by any kind of conveyance.

And therefore though I said, that discharge of bull or composition was to die with the corporation, yet, if it were once run out time out of mind, it was then to be pleaded and used as a non-charge, by prescription, which was a title of discharge by the temporal law; and if it were impugned, it was to be drawn by prohibition to a trial at the common law, and this without the help of any statute. And therefore in the bishop of *Winchester's* case, it was resolved, that the bishop holding lands of his bishoprick, discharged of tithes by prescription, his farmer being a layman, shall have a prohibition for his discharge; and so shall the bishop have himself, though he be a spiritual person. And yet bishopricks and their lands are, in point of discharge of tithes at the common law, out of all statutes. So then, the conclusion is, that of the five ways of discharge of tithes, three, that is to say, order, composition, bull or canon, are preserved and kept alive by the clause of discharge in the statute of 31 H. 8. and a fourth, which is unity, is created by that branch; and the fifth, which is prescription, stands by the common law, and hath no need nor use of any statute.

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Fourthly, It was such a bear's whelp, as it was an age before it would be brought in any shape, and yet when all was done, it was cast into a form of pleading which departs from the rules of all art of reasoning: for it is pleaded thus, for example: The prior of *Hatfield, &c.* time out of mind, was seised of the parsonage and land, *simul et semel, et ratione inde* held the land discharged, &c. And yet you may not deny the argument, which must be, that unity by prescription dischargeth, though it be confessed to be false. And if you suppose the *majr*, and turn it into a *syllgijm*, you are not allowed to deny it so as to demur in law upon it; yet wheresoever such a unity is with a clear non-payment of tithes time out of mind in a body spiritual, capable of a non-charge, it might have been laid as an absolute discharge upon better reason directly, than to lay it upon the unity; for the presumption of a perfect discharge in that case was not doubtful; for in *Pridall's* case, *Co. lib. 11. fol. 14.* it is truly said, that a unity and a perfect discharge by prescription may stand together.

Now then it is agreed, that where the unity is such as is allowed for discharge, it is not so allowed for itself, and of its own strength, but in contemplation of a true discharge, which in such confusion of possessions and privileges of all natures may well be conceived, though it cannot be shewed. Now that presumption fails in this case. For where there are four ways, as hath been said, to discharge abbey lands of tithes; that is to say, order, composition, bull or canon, and prescription; all these may be presumed to maintain the discharge by unity, where the same body of the abbey continued seised, both of the parsonage and the land, from beyond memory, till the statute of 31 *H. 8.* For then that statute, and the clause of discharge thereof, did attach upon it with full advantage. But in this case, which is a novelty, three of these presumptions fail with the priory of *Hatfield*, as hath been said, that in order, composition, and bull or canon.

Now if it be said, that if the abbey of *Hatfield* were discharged by prescription, that that remains; I answer, that if it be so taken, it makes expressly against the plaintiff; for that discharge is sufficient of itself according to the course of the common law, and hath no need of the help of any statute, as hath been said, and therefore cannot be admitted in understanding to maintain a unity, which hath no force but by the statute of 31. for fiction is never admitted where truth may work; as where *cessuy. que use*, and his scotfee

feoffee join in a feoffment, it shall be the feoffment of the feoffee. So, where in *Priddle's* case, it hath been said, that an effectual unity must have four qualities; that is to say, it must be *perpetua, equalis, legitima, et libera*; you must add unto it a fifth, that is, it must continue in the same body: else the presumption of true discharge ceasing loseth its force. And I am of opinion, that, if in this case the plaintiff should lay the discharge by prescription, the defendant might avoid it by shewing, that the abbey was discharged by order, composition, or bull, within the time of memory, or, at the least, it were a great evidence for him.

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M. 18 Ja. A. D. 1620. C. B.

Baker v. Cocker. [Hob. 295.]

PETER Baker, vicar of *Stower Payne*, libelled in the spiritual court for tithe-lambs against *Robert Cocker*, and laid, that there was a custom there, that all lambs engendered, fallen, and bred upon any one tenement, or living in the same parish, although they belonged to several owners, have been cast, and reckoned together, as if they were but one man's, and the tenth or tithe-lamb of them so counted together hath been paid for tithe.

Lambs of several owners reckoned together, an unreasonable custom.

Whereupon *Henden* prayed a prohibition, because all customs against common right are triable at the common law. Which was granted. And the court was further of opinion, that the pretended custom was unreasonable and against law: for by this means it might fall out, that some one might have but one lamb, and that might be taken for tithe, and he that had more should pay nothing at all.

M. 18 Ja. A. D. 1620. C. B.

Slade v. Drake. [Hob. 295.]

ROGER Slade brings a prohibition against *John Drake* esquire, farmer of the rectory of *Axminster*, and declares, that whereas *Richard Gill* late abbot of the monastery of *Newham*, in the county of *Devon*, was seised of a messuage and divers lands, meadow and pasture, parcel of the possessions of that monastery, to the time of the dissolution, in fee; and whereas also the same abbot by himself and his farmers, at the time of the same dissolution, held and enjoyed the same acquitted and discharged of all manner of tithes; and being so seised, surrendered the same 30 H. 8.; and then recites the clause of discharge of tithes in the statute 31 H. 8. and then brings

In a declaration on a prohibition, if the plaintiff claim an exemption under an abbey, he must shew not only that the abbot held the lands discharged at the time of the dissolution, but also

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by what means, and in what manner, he held them so discharged.

down the land by descent to queen *Elizabeth*, and from her to the duke of *Norfolk*, and from him to the lord *William Howard*; and that he by indenture enrolled in the chancery, within six months, bargained and sold the same unto the lord *Petre* and his son, 3 *Jac.* and they demised it unto *Slade* the plaintiff; and then *Drake* the defendant sued him in the consistory court of the bishop of *Exeter* for tithe of wheat and other grain against the form of the said statute.

Whereupon the defendant demurs in law generally, and prays a consultation.

Upon this case, after solemn argument, judgement was given for the defendant, and a consultation awarded, *Warburton* dissenting.

In the argument of this case, I made two great points.

The first, whether the declaration were good or no? and I held it not good.

The second, whether the fault of the declaration were in the substance, so that advantage might be taken of it upon a general demurrer? and I held the fault substantial. I first professed if my judgement should take counsel of my interest or affection, I should be of another mind; but I was bound within former rules of justice, precedents, religion, and prudence. Justice, *suum cuique tribuere*, tithes to whom tithes belong. Precedent, *stare super semitas antiquas*. Religion, *merito summa habetur ratio, quæ pro religione facit*. Prudence, *quod dubitas, ne feceris. De non apparentibus et non existentibus eadem est ratio*. Now to the first point; *Littleton* says, that pleading is the honourable, commendable, and profitable part of the law, and by good desert it is so; for cases arise by chance, and are many times intricate, confused, and obscured, and are cast into form, and made evident, clear, and easy, both to judge and jury (which are the arbitrators of all causes) by good and fair pleading. So that this is the principal art of law, for pleading is not talking; and therefore it is required that pleading be true; that is the goodness and virtue of pleading; and that it be certain and single, and that is the beauty and grace of pleading.

The law loves single pleading, abhors double.

Therefore the law refuseth double pleading, and negative pregnant, though they be true, because they do inveigle, and not settle the judgement upon one point.

Therefore first general pleading is disallowed though it be in matters of fact, as a covenant to make an estate by the advice of *J. S.* he must shew what advice he gave, 26 *H. 8. 1.* 16 *E. 4. 9.*

Condition that the obligee shall enjoy an office according to a grant of letters patent, he must not plead in *hæc verba*, but he must shew the effect of the letters patent, and the enjoying accordingly.

But

But because it hath been said, this is a spiritual act (which yet I grant not to be so) he that pleads deposition of an abbot, he shall plead before what ordinary, 9 E. 4. 24.

So, debt upon lease of a vicarage, the defendant pleading a sequestration, must shew by what ordinary, for what causes, as for non-residence or the like, and legal process of sequestration, 5 E. 4. 29.

So, union of chapel must be shewed; by whom, *scil.* the pope or bishop; not generally, *concurrentibus iis*, &c. 11 H. 7. 8.

In pleading a divorce, you must shew before whom it was, and set forth the cause of divorce, 11 H. 7. 27; but all the proceedings you shall not need, as you should of a recovery at the common law, 21 E. 4. And therefore in *Specot's* case, 5 Rep. 57. the bishop cannot plead cause of refusal, *schismaticus inveteratus*: nor upon the statute 4 H. 4. that a man was defamed of heresy. But they must specify the schism or heresy, though they be matters of mere spiritual cognizance. *Vide Dyer*, 8 Eliz. 154. Haunter of taverns, player at unlawful games, *et ob alia diversa crimina criminofus*.

For this is regular for difference between the king's courts and the courts ecclesiastical, that though a spiritual cause cannot originally and primitively fall into the king's court; as for calling a man heretick he shall not have an action of the case, 20 H. 8. yet, if a civil action be well commenced, as in the cases cited, *a quare impedit* or an action of false imprisonment, if any thing fall incidently, that is spiritual, the king's court shall continue the plea upon it either by jury or demurrer, except in case where the law hath provided trial by ecclesiasticks; as by the issue upon bastardy *n'unques accouple*, &c. *literature*, and the like: in which cases the bishops are not judges, but ministers of the king's courts as other kind of triers are; whereupon the court proceeds to judgement according to their certificates and trials. But on the contrary, if a case begin well in the spiritual court as being spiritual, and a point fall incidently, that is of temporal cognizance, it is clean contrary: for the trial is called from them; as in daily experience, in prescription and limits of parishes, in suits of tithes.

Now, if it be a point of discharge that is to be pleaded, as this case is, it must ever be pleaded specially, and shewed to the court, how the discharge is; for it is no discharge if it be not sufficient; and the sufficiency is matter of law, and therefore must be seen and judged by the court; as is 22 F. 4. fol. 40. And *Manfel's* case, Co. lib. 2. fol. 3.

Now, touching the discharging of tithes themselves, and the pleading of them at the common law; it is to be observed, that they are

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things of common right, and do of right belong unto the church. And therefore though it be true, that before the council of *Lateran*, there were no parishes, nor parish priests that could claim them, but a man might give them to what spiritual person he would; yet to the church he must give them. But since parishes were erected, they are due to the parson, (except in spiritual regular cases), or vicar of the parish; and therefore when you have a prohibition of discharge of tithes, you must consider it is a plea in bar against common right to a demand of tithes, which is a common right, though they be in several courts, as by a release either in deed or law.

Now then, if you will discharge a just demand, you must satisfy the court of your discharge. Consider then the kinds of discharge of tithes, the persons capable of them, and the means how.

The persons or bodies capable of them, are either spiritual or temporal.

Temporal I say, when they were temporal, when the discharge did first vest in them; for otherwise if the temporal man succeed a spiritual body in discharge, as upon the statute 31 *H. 8.* it is to be reckoned in a spiritual person or body, not in a temporal one.

Discharge
of tithes.

The spiritual person had four ordinary ways of discharge, that is, 1st. bull of the pope: 2dly. composition: 3dly. prescription, and these were absolute: 4thly. order, and that was limited so long as land remained in the manurance of the religious persons themselves; and these were the Cistercians, the Templars, and the Hospitallers, or Hierusalomitans: but unity of possession of the parsonage appropriate and the land tithable was no discharge, nor so holden at the common law; but how that came into use, and upon what reasons, and with what cautions, and how to be deducted in pleading, I shall speak after when I come to the statute of 31 *H. 8.*

Now, clearly, at the common law, the spiritual person could not claim his discharge by bull, composition, or order; but he must plead it with his ground and reason specially; but his discharge by prescription was allowed him without any other reason, because he was a person capable of such discharge. And so the original was probable, and therefore the prescription was allowed him as in other cases immemorial whereof the original cannot be found, but is ever presumed just.

Now temporal persons (not to speak of the king, which was a special case, 22 *Affise*) had two ways to obtain tithes, or to discharge tithes; the first was by grant of the parson, patron, or ordinary: the other was by a prescription; but that was ever, not *prescriptio simplex*, but *composita*, not a prescription single but compounded, differing

fering from the case of the spiritual persons. And so is *Pigot and Heron's case*. And so are the common cases, where men have the discharge of tithes in kind by paying composition for them in money or land or pension held or enjoyed by parsons and vicars in lieu of them, 8 E. 4. *F. N. B. &c.*

But now note a strange *anomalum* in this case, tithes differing from all other cases in law.

For whereas prescription and antiquity of time fortify all other titles, and suppose the best beginning that law can give them: in this case it works clean contrary. For whereas a grant of a parson, patron, and ordinary is good of itself without any recompence or consideration; when it runs out to prescription, it dies and perishes; whereof no other reason is given, but that our books say that a man may prescribe in *modo decimandi*, but not in *non decimando*: and this is in *favorem ecclesiæ*, lest lay-men should spoil the church.

But I will make another reason not dissonant from law.

There are presumptions of law so violent, as though they be false, a man should not be received to aver against them; as, in a *precipe*, the tenant pleaded himself villein to *T. S.* and that he hath nothing but his villenage; the demandant had no reply, though it were false, but his writ must needs abate, till the statute 37 E. 3. did admit the counterplea; *Mansel's case*, and 16 H. 7. So in replevin, if upon avowry the tenant disclaims, he shall have judgement, though it be false: for the law believes, that these parties will not do themselves wrong in so high a degree. The like reason moves in this case: the law presumes violently that a layman cannot be absolutely discharged of tithes; and therefore will not allow a prescription of such discharge; holding it more reasonable, that some one man should suffer a mischief to lose such a privilege, being so improbable and of so dangerous consequence, than for his particular to admit a spoil of the church and a decay of religion, according to the rule, *omne magnum exemplum aliquid habet ex iniquo, quod publicâ utilitate compensatur*.

So, though you shall be allowed your discharge by grant when it appears, yet when it appears not, *stabitur præsumptioni donec probetur in contrarium*.

Now the common law, as touching the discharge of tithes, and the forms of pleading it, standing thus; the next question is, what change the statute of 31 H. 8. of monasteries hath made in that behalf?

And I am of opinion that it hath made two main changes.

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The first, that it hath by force of the clause of discharge preserved and continued certain discharges that were before the statute, that is, by bull, composition, and order, and conveyed them over to the king and lay persons, which else would have vanished and dissolved with the spiritual bodies themselves, whereunto they were annexed.

The next is, that it hath created and made one new discharge which was not before at the common law, that is, the unity of the possession of the parsonage and the land tithable in one hand.

And this was long controverted ; but now is a received opinion by the determination of the king's courts to be *de lege*, a discharge within the meaning of the law ; as the divines say, that articles are made *de fide*, by the determination of the church.

But in this case of unity, four things are to be observed :

First, that it is no discharge of tithes but (as it is well observed) a discharge of the payment of tithes ; and, therefore, if it be pleaded by way of discharge generally, and the jury find nothing but a perpetual unity, it is found against the pleader ; and so much is agreed in *Priddle* and *Napier's* case.

It is no discharge, except it be by prescription.

If it be perpetual, yet, if it be alleged, that the abbot or his farmer paid tithes, that doth destroy the prescription, because that proves that there was no real discharge, but a non-payment by unity only : yet a unity by prescription is good *primâ facie* ; but not of itself, but in contemplation of a perfect discharge, that shall be supposed, though it cannot be found for the infiniteness and impossibility of search of things beyond memory.

Lastly, though unity perpetual be allowed, yet it is not well pleaded except you had that *ratione inde* they held discharged of payment of tithes time out of mind ; for though the unity shall be traversed, and not that conclusion or consequent, yet that conclusion fixeth it to the statute, and answers the real and perfect discharge that is presumed under the unity, to which the unity itself is but augmentative : but yet I am of opinion, it is but a fault in form, which will be cured by a verdict or general demurrer.

This discharge by unity being the only discharge that is created and made of new by this statute, all other discharges are not otherwise preserved but by these words, “ that the king, his heirs and
“ successors, and such persons, their heirs and assigns, which shall
“ have and hold them according to their estates and titles, be dis-
“ charged and acquitted of payment of tithes, as freely, and in as
“ large

“ large and ample manner as the said abbot had or held the same at the day of the dissolution of the same.”

So, first, it is plain that this clause gives neither new discharges, nor enlarges the old; but continues and bounds them within the limits of those that were enjoyed by the abbot both by word and meaning according to the cases, *tot, tanta, &c.* For though unity (as hath been said) be now used for a discharge, yet it is not so for itself, but for a more perfect, which is presumed, though it appears not.

Now this being the substance and body of this clause in word and meaning, it is strange it should be moved, that out of this clause may be drawn a conceit of a liberty given to the possessors of abbey lands, to plead their discharges in other form, and with more generality and favour, than the abbots themselves had in those cases: against which the reasons are many.

First, the word is expressly touching the having and holding of them, not a touch nor a glance of the pleading of them, which is merely *heterogeneum*.

Secondly, if these words should be extended to pleading it would turn expressly against them; for then it must be understood, that they shall have the benefit of pleading in as large and ample manner as the abbots had. Which implies a negative, that it shall be in no other nor larger manner; for the rule is, that affirmatives in statutes that introduce new laws, imply a negative of all that is not in the purview.

And therefore in *Amy Townsend's case*, *Plow. 111.* it is adjudged, as it hath been since, that where one comes to a possession by a use out of a state discontinued, so that the entry was not lawful to the *cestui que use*, such a possession works no remitter, because the statute appoints the possession in the same manner and form (which imports a negative), and no other as are in use.

So the statute *Westm. 2.* appoints that the demandant in a *quod ei de forceat* may vouch *ac si esset tenens*; if in the first action he could not vouch (as if it were a *scire fac*), then cannot he vouch in the *quod ei de forceat*, being demandant, *14 H. 7. 18.*

Thirdly, if you shall admit this exposition upon this clause, you must admit it also upon the body of the law, upon the like words, which are thus: “ the king shall have and hold, to him, his heirs and successors, all monasteries, and all their lands, tenements, rents, &c. and in as large and ample manner as the abbots had the same at the time of the dissolution;” so then it shall suffice to plead,

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that the abbot was seised of a rent charge out of my land at the time of the dissolution, &c. without shewing any other title. And so of other statutes; and this kind of pleading hath the same pretence of loss of writings, of grants, of rents, reversions, and the like, and infiniteness of search, and more than the case of bulls and the like.

4. This form of pleading that lies so open and obvious in the words of the statute, and was so easy and pleasing to them that sought discharge, was never to this day amongst so many busy wits ever offered in any authenthical pleading, much less received the least allowance, by the opinion of any learned or grave man; but the contrary, by the specification of the discharges, except in the case of prescription; and yet in the case of unity, though it be by prescription, it is also specified.

5. Lastly, this were to take a statute contrary to the common law, which trusted not laymen with their prescriptions, and yet now you will trust them without prescription, with that that belongs to the court to judge. And this is against a main rule in expounding statutes, especially in *adiopis*.

So no man but can see what absurdities would follow by admitting a change of regular forms of pleading to vulgar speech, used in acts of parliament, to express the meanings which are every day by the judges extended, restrained, and changed according to a better rule of reason and justice than the words bear. And if the words rule not in substance, much less in the forms of pleading, which is the act of law, as hath been said: and this precedent of irregularity of pleading is as ill in consequence as the principle.

So the statute of 4 H. 4. of heresy, before mentioned, was not pleaded as the statute went in general, but the heresy specially assigned.

Now take the statute 34 H. 8. c. 20. that provides, that if the tenant in tail of the gift and provision of the king, suffer a common recovery, the reversion or remainder then being in the king, that such recovery shall not bind the heirs in tail, but that they may enter after the death of the tenant in tail; will any man say that the heir may plead that his ancestor was tenant in tail of the king's provision and reversion or remainder in the crown, when he suffered the recovery?

So, in the case of 11 H. 7. c. 20. if any woman (being tenant in tail of the gift of any of the ancestors of the husband) discontinue, the same shall be void, and it shall be lawful to the person, to whom the interest after the death of the woman shall appertain, to enter;

enter: will any man say that it were well pleaded in these words, without shewing how the estate grew, or how the discontinuance was made? and yet he that is to take the benefit may be a stranger to the conveyance, as upon a covenant to raise the use.

So, upon the statute 32 H. 8. of conditions, there are no mischiefs to the discharges that were before time of memory of all sorts: for they must be maintained and pleaded by prescription, even unity itself may be so. Neither is there any mischief in effect to those discharges, which were created since memory; if they be true, and the original unknown; for they may be both supposed and pleaded by prescription: for they had their effect of discharge, and the prescription cannot be impeached, but by shewing a late original of such discharge, which if the adversary can shew, the party himself may much better: so then there remains no prejudice but in one case, where there can be no reasonable presumption of a lawful discharge, which is, where there cannot possibly be a discharge by prescription, that is, where either the abbey was founded, or the lands were purchased to the abbey since memory, in which case to presume a discharge even to the last times, where there is no appearance of it, is as much as to say all abbies have discharges for all their lands; which may be extended even to orders that had discharges thereby for their own manurance; for they might also obtain by bull, or otherwise, general and absolute discharges. And this may be concluded, that if this form of pleading be once received, you shall have all others left, and this only used, which is one of the weightiest reasons that makes me explode it, considering the busy wits, that have used all means to win discharges and forms of pleading to that purpose, and yet never took boldness to offer this. And what needed all the labour about unity by prescription, or without prescription, if they might have pleaded discharges at the time of the dissolution? For it is easy to prove a non-payment, by reason of a unity for any time; and non-payment is the common evidence for the proof of a discharge sufficient, which may be proved when a perpetual unity cannot be.

Discharge in abbots must now be proved *a posteriori*, for no man living can now speak to the time of abbots. As to the case of *Wimbish* and *Talboys*, it is no authority; for the judges are divided two to two. Secondly, both parties pleaded there, *viz.* covin and deceit were matter of fact.

And as to the case of *Strata Marcella*, that is no authority at all; for no judge speaks a word to that point, and the judgement passeth
against

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against him that pleaded so. But that indeed was upon another reason and point. And as to *Coke's* opinion in this case of the bishop of *Canterbury*, lib. 2. 48. I answer, first, that the opinion makes not at all to the judgement of the case, to say that by the statute 31 such a discharge may be pleaded.

Next, it is no part of the resolution of the court, but an addition of his own, and that sudden and interposed.

Thirdly, it is so imperfectly set down, that the prior, &c. so it may be the prior and his predecessors.

And as to such an allegation being commonly used in prohibitions; this argues plainly, that either he mistook the practice, or the book mistook him, (which I rather believe), which is made the ground of his opinion: for there is no authentical precedent, much less judgement or grave opinion to that purpose.

And again that case of *Winchester*, in the same book, fol. 44. being both 38 *Elizabeth*, *Priddle's* case coming after, 10 *Jac.* in his 11 book fol. 44. he makes these questions, that if any abbey have been time out of mind, and an appropriation since, yet they may prescribe in a general discharge; for that may be though a unity come after. But saith he, if the abbey itself were founded since memory, then he cannot prescribe at all in the general discharge; and so leaves it as a case desperate, where the abbey was founded since memory; which yet he might easily have relieved, if he might plead a discharge; time of the dissolution, without shewing how; which is either a retraction or an explanation of his former report.

Now to that which was well moved and objected by my brother *Hutton*, that the plaintiff hath not well conveyed to himself the land charged with tithes, I hold that the defendant, notwithstanding that defect, cannot upon the whole matter have a consultation, if the discharge had been well pleaded: for the title of the land is not in question, but whether the land be discharged or no, which any man that is answerable for the tithes may plead, whether he have good title to the land or no; and since the parson in this case hath sued him for the tithe, he hath enabled him to make his defence, either by plea of discharge in the ecclesiastical court, where he needs no title; or by prohibition to the same effect in the king's court, which is in lieu of it, and supposeth that he offered his plea there.

And this is regularly true, that if the prohibition be faulty, yet the defendant shall never have a consultation, if it appear to the court that the suit in the ecclesiastical court was not well founded, as it was there heard, though he might have had a suit in another manner.

And

And therefore *M. 1 & 2 Eliz. Dy. 170.* one sued for tithe corn on sixty acres of ground; the defendant in his prohibition laid that all was barren ground, and paid no tithes; whereupon issue was taken, and the jury found that thirty acres were so, and that the other thirty acres were barren, but yet had paid tithe, wool and lamb. The whole court thought at first a consultation ought to be awarded for that part; but yet upon better advisement, they resolved the contrary; for he had no right to pursue his suit for corn; and by the same reason, if the land be discharged, he ought not to sue any man for the tithes of it, whether he hath title to the land or no.

I hold the declaration grossly faulty in another point, that he hath laid no estate of the discharge of tithes; for he hath not said that *Gill* the abbot was seised of the land in his demesne as of fee discharged of tithes; but hath made it two sentences, that he was seised of the land in fee, at the time of the dissolution discharged of tithes, which may be true, if it were but for that year by grant of parson, patron, or ordinary.

The second great question is, whether the demandant in this case ought to have demurred especially? for the plaintiff hath laid, that the land was discharged, which the defendant by his demurrer may seem to have confessed. But I am of clear opinion, that the general demurrer notwithstanding, the defendant may still take advantage of the fault. The words of the statute are, that the judges shall proceed, and give judgement according as to the very right of the cause and matter in law shall appear unto them: so right is as no right, if it appear not to the court, as we proved in the case of *Heard* and *Baskerville*, that the not shewing of a deed, or not producing the letters testamentary, or of administration, or not laying a place of *visne*, is not remedied by general demurrer,

[Upon this judgement a writ of error was brought, and the case was argued three several times in the court of king's bench; 1st. by *Bridgeman* for the plaintiff in error, and *Calthorpe* for the defendant; next, by *George Croke* for the plaintiff, and *Fermyn* for the defendant; and thirdly, by *Yelverton* for the plaintiff, and *Dampart* for the defendant. *Calthorpe* has given but a part of his argument, and refers for the residue to a manuscript book of which I have not been able to get possession. I have therefore contented myself with extracting the arguments of *Yelverton* and *Dampart*, as the question seems to have been more fully discussed by *Yelverton* than by either of the counsel who preceded him.]

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Ytherton.—It appears by the several clauses of the statute of 31 H. 8. c. 13. that that statute aims rather at a discharge in possession, than in right, and that being so, it will be sufficient in a surmise for a prohibition, to shew a discharge in possession, which is a discharge from the payment of tithes at the time of the dissolution; and the law will not oblige a man to shew a discharge in right. And that the statute aims only at a discharge in possession will be evident upon considering it: for after reciting that “divers others were discharged of the payment of tithes before the dissolution,” it enacts, that “all and every such person or persons, their heirs and assigns, which have or hereafter shall have any monasteries, &c. shall have, hold, and enjoy them, &c. according to their estates and titles, discharged and acquitted of payment of tithes, as freely and in as large and ample manner as the said late abbots, &c. held them, &c. at the day of the dissolution:” so that the statute speaks only of a discharge from the payment of tithes, which is merely a possessory discharge, and not a discharge in right; as we may see by 18 E. 3. Barre 247. which takes a difference where a defeasance is for the discharge of an annuity, and where it is for the discharge of payment of an annuity: for in the first case a release must be produced, because it goes to the right: but it will be otherwise in the other case, because it goes only to the payment. By 38 E. 3. 6. it appears, that there is a difference where the right of tithes comes in question, and where the possession: for that in the first case the court will be ousted of jurisdiction, but not in the last. In 13 H. 4. 10. upon a *quo warranto* it is holden, that if the question be of the right, a special answer must be given; but, if it be merely of the possession of the liberties, then it is not necessary to make title.

2. If the general surmise be not good, and the patentees shall not hold discharged of the payment of tithes according to the possession of the abbey at the time of the dissolution, great mischief will ensue to the purchasers, it being impossible for them to shew the particular discharges of the abbey: for there are six manners of discharge from the payment of tithes, *viz.* by order, by the pope’s bulls, by prescription, by composition, by councils, by unity of possession; and some abbies had one part of their lands discharged one way, and another part another way; and how is it possible for a purchaser to shew the particular discharge amid such a variety? To obviate the mischief that would ensue from this, the statute must receive a favourable exposition, as other statutes of a similar

a similar kind have; as in 4 H. 6. 26. by *Martin*, 11 H. 6. 4. by *Newton*, Com. 538. by *Dyer*, where you will see the rule given by the judges for the exposition of statutes, that they are to be so construed as to redress the mischief.

3. The patentees come in in the *post*, and are not any way privy to the instrument of discharge: and therefore to force them to shew the instrument, where they have not any means of coming at it, nor are any way privy to it, is against reason. And that they are not privy appears by 3 E. 3. *Garrantee* 70. & 35 H. 6. 57. where it is holden, that the Hospitallers, who had the lands of the Templars after their dissolution, should not take a tenure in frankalmoigne, or an appropriation made to the Templars. And it is clear that the king and his patentees come in by the surrender of the abbots, and under them, and not by the statute of 31 H. 8. c. 13. as we may see by Dy. 3. & Com. *Adams's case*; and after the surrender of the possessions the corporation remains as it was before, according to the case of *Magdalen College*, in 2 Rep. 77, 78. 20 H. 8. Br. *Extinguishment* 35. & 32 H. 8. Br. *Corporations* 78. and if the corporation remains, the privilege which was personal, and annexed to the corporation, remains with it, and was not in anywise transferred. And although the 31 H. 8. hath a clause for the settling of abbies in law, yet things annexed in privy will not be transferred by that statute. Which being so, it follows that the patentees cannot hold those lands discharged of the payment of tithes, unless it be in respect of a possessory discharge; for the discharge in right, be it by order, bulls, &c. is not transferable.

4. The prohibition demands nothing, but is only to give jurisdiction to the temporal court, and to stay a suit in court christian: and the law hath at all times been very favourable to the jurisdiction of the temporal courts, that they shall not be ousted of jurisdiction by any nice construction; and therefore in 31 H. 6. 7. we see that before the statute of *West.* 2. an *indicavit* was grantable at common law, though the suit was for less than a fourth part of the tithes; and after the statute of *West.* 2. and of *Articuli cleri*, a writ *de advocacione decimarum* was allowed; with which agrees 16 E. 3. *Quare impedit* 147. By 38 E. 3. 13. & F. N. B. 30. a writ of right lies of oblations. By 4 E. 3. 141. it is not necessary to allege esplees in an *indicavit*: and by 18 E. 3. 58. the time of avoidance is triable at common law, and shall not come in upon the bishop's certificate: and by *Fineux*, 10 H. 7. 24. the temporal court shall not be ousted of jurisdiction without special

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cial cause shewn. And notwithstanding the statute of 2 & 3 E. 6. does not direct any particular action for the treble value; yet the judges in their exposition of that statute have always holden, that an action of debt is maintainable; and so it was adjudged in 28 Eüz. when the first action of debt was brought upon the statute; and in 40 Eüz. Rit. 699. *Rid and Bede's case*, it was ruled accordingly. And if the law should drive the plaintiff in the prohibition to make a special surmise, then might the court be ousted of jurisdiction, where there was no reason; and further, the judges of the common law might give their judgement upon a papal bull, and upon the validity of a thing which does not belong to their consueance. If too in an action of debt on the statute of 2 & 3 E. 6. where the plaintiff demands the treble value of the tithes, it be sufficient to state that he was *propriarius* generally, without shewing any title, as it hath been adjudged to be; a *fortiori* a general surmise will be sufficient in a prohibition, where nothing is demanded.

5. The statute being general, the surmise may well enough be general: for it is not necessary that the plea should be special, where the statute is general; as we see by 4 H. 7. 8. 26 E. 3. 65. & 9 E. 3. 5. where a general pleading was allowed to be good. And if the plaintiff in prohibition were forced to make a special surmise, then it might happen that he might be forced to found his surmise upon a papal bull; for according to 7 E. 3. 5. & 11 H. 7. 17. the pope might well enough discharge a man from the payment of tithes: but the taking of bulls from the pope was condemned by the common law, as appears by the book of 30 J. 7. & 11 H. 4. 36. and the statute of 25 H. 8. is more strict against them. Wherefore to avoid this inconvenience the plaintiff in prohibition shall not be driven to make a special surmise.

6. The plaintiff in prohibition shall not be obliged to suggest more than the defendant is bound to answer to; and there being some discharges, which are not traversable, as the discharges by union and by order; it is not necessary that they should be shewn specially.

A discharge from the payment of tithes being by act of it must of necessity relate to the statute of 31 H. 8. for other parliamentary discharge: and a special surmise is suffice in the case at bar, because the prohibition is now debated

debated in the king's bench, which court has greater power (b) in the granting of prohibitions than the common pleas has, according to 18 *Eliz. Dy.* 349. And as to what has been objected, that the statute is not general, but that it is, that the patentee shall hold as freely as the other abbots did; I answer, that this clause was inserted for the security of purchasers, and in respect of the quantity and quality of their estate, for by this clause the purchasers hold as freely as the abbots held; for which reason it was adjudged in one *Bradstock's case*, 24 *Eliz.* that a common, which was extinguished by unity of possession in the hands of a prior, should not be revived upon severance of the land to which the common is appendant, and the land where the common was taken. And if the tenancy escheat, the patentee shall have as great an estate in the tenancy as he had in the seignior. 2. The clause was inserted for equality of justice; because, without this clause those who had annuities in respect of their tithes (and there were many according to the books of 11 *H. 4.* 6 & 8. 9 *H. 4.* 19. 16 *E. 3.* *Annuity* 24. 29 *E. 3.* *Grant* 103. & 3 *H. 7.* 14.) could not have had those annuities after the dissolution. 3. The addition of this clause makes the king and his farmers subject to the same justice in this point, as others are subject to; and therefore it was adjudged in *Gerard's case*, 34 *Eliz. B. R.* that a prohibition was grantable as well against the king and his farmers, where they sue for tithes, as against another person. 4. Without this clause there would have been a larger discharge than there ought to have been: for if an abbot had been discharged of all his lands *exceptis novalibus*, those *novalia* would have been also discharged, but for this clause; and therefore the clause was of necessity to be added in order to make a conformity. As to what has been objected out of the *abbot of Strata Marcella's case*, 20 *E. 3.* *Avowry* 129. where there was a reference to the liberties of *Northampton*, that those liberties ought to be specially shewn, I answer, that they are matter of record, which may be obtained by search, and for the finding of which there are ample means; but these discharges from the payment of tithes are not any matters of record, but merely matters in *pais*. The discharge too by a bull of the pope is not a thing producible; and 44 *E. 3.* 32. it appears that the rolls of the bishop are not of re-

(b) Sitting as a court of appeal the court of king's bench can exercise no other power than the court of common pleas could have exercised.

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cord. Where a tenancy escheats, there shall be a discharge from the payment of tithes under the statute of 31 H. 8. because it comes in lieu of the seignior, which was discharged.

Dampart contra.—There are six manners of discharge: The 1st is by order, as the Cistercians, Templars, and Hospitallers, according to 10 Eliz. Dy. 277. and 2 H. 4. c. 4. and this discharge is personal, and does not go to the assignee. The 2d is by bull of the pope according to the statute of 2 H. 4. c. 4. and 11 H. 7. 17. and of this discharge also the assignee is not capable. The 3d is by union, as we see in *Trot and Greville's case*, 2 Rep. 48. and of this the assignee is not capable. The 4th is by prescription; and this goes to the assignee, according to the *bishop of Winchester's case*, 2 Rep. 44. and 42 E. 3. 3. The 5th is by composition real; and this discharge is transferable, according to the books of 8 E. 4. 13. 38 E. 3. 6. and the *Register* 38 & 39. The 6th is by council; and this is also transferable, according to 42 E. 3. 3. As to the first three discharges, they can never come in question in our law, because the suit was only between spiritual persons, and the ecclesiastical law had consue of them: and as to the other three discharges, they would never come in question in our law, but where the special matter of the discharge was contained in the prohibition, as we see by 2 Rep. 44. 8 E. 4. 13. and *Register* 38 & 39. and it being so, that a special matter of discharge was necessary at common law, the statute makes no alteration; for it does not alter the form of pleading for those discharges which were transferable; for as to those, it was merely declaratory *antiqui juris*: but, as to the other three discharges, which were not transferable at common law, it is introductive *novi juris*, for it makes them pleadable at the common law, whereas before the statute they were not so; and if the statute had not been made, those three discharges, being only personal discharges, would have been extinct; but the statute hath upheld them; but as to the other three discharges they would have remained well enough, though the statute had not been made. And the words "according to their estate and title" are words of great use; for otherwise a temporary discharge at the time of making the statute would have been a perpetual discharge, which the statute now remedies. And as to the answer which has been endeavoured to be given to the book of 20 E. 3. *Avowry* 129. it will not suffice, for no such diversity is warranted by our books.

2. The prohibition being in nature of a title, which a man makes to a thing against common right, (for he makes title to draw the

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conuſance from the ſpiritual court to the temporal court), it ought to be ſpecial, according to the books of 30 H. 6. 8. 32 H. 6. 32. 7 E. 6. Dy. 85. & 2 E. 3. p. 1. 2. It is reaſonable that there ſhould be ſuch certainty in the ſurmife, that the party may know to what he is to anſwer; and the jury may know what iſſue they are to try, according to *Comm.* 84. & 33 H. 6. 32. which cannot be unleſs the ſurmife be ſpecial. 3. The ſurmife being to ouſt a court of jurisdiction, ought to be ſpecial, according to 12 H. 4. 13. & 17 & 38 E. 3. 6. where it appears, that the court ſhall not be ouſted of jurisdiction without ſpecial cauſe ſhewn. And it appears by 22 E. 4. 40. 18 E. 3. *Barre* 247. & 2 *Rep.* 3. that to allege a diſcharge generally, without ſhewing how, is not ſufficient. And as to the impoſſibility which has been objected, there is not any ſuch matter: for it is ſufficient for the plaintiff to allege an immemorial unity of poſſeſſion without more; and unleſs the defendant can ſhew the contrary, the iſſue will go in his favour: but, if the defendant can ſhew the foundation to be within time of memory, then the prohibition will not hold, according to the reſolution in *Priddle and Napier's caſe*, which is direct in the very point in our caſe. And it has been the conſtant practice in prohibitions ever ſince the ſtatute to make a ſpecial ſurmife, as we ſee by 2 *Rep.* 47, 48. 18 *Eliz.* Dy. 349; and in the New Book of Entries, 450, 451. & 554. and therefore there is no reaſon to make any alteration now, ſince ſuch inconvenience will follow from it to the church.

Co. Entr.

Sir James Lea, Dodderidge, and Houghton J. ſeemed to incline, that the ſurmife in the caſe at bar was not good. *Sed adjournatur.*

[*Mr. Noy ſays in his argument in the caſe of Dickenson v. Greenlow, 2 Ro. Rep. 481. & infra, that the judgement in this caſe would have been affirmed, if the parties had not previously ſettled the matter.*]

M. 22 Ja. A. D. 1624. B. R.

Dickenson v. Greenhill. [2 Ro. Rep. 479.]

GREENHILL is ſued in the ſpiritual court for tithes; and in order to have a prohibition he ſuggeſts, that *Robert* the late abbot of *Cokerſand*, was ſeiſed of the land in queſtion in fee, as parcel of the monaſtery, and at the time of the diſſolution; and

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that he and his predecessors from time whereof, &c. from their foundation to their dissolution, were of the order of the Præmonstratenses; and that all the abbots, and all the religious of that order from time whereof, &c. *immunes, liberi, privilegiati et exonerati fuerunt, et esse debuerunt a solutione omnium decimarum quarumcunque de et super their lands, &c. quodocunque manibus aut sumptibus propriis eas excolebant*: and that Robert and his predecessors from time whereof, &c. had enjoyed their lands, &c. free *de solutione decimarum quodocunque manibus et sumptibus propriis excolebant*: he then states the dissolution of the abbey, and the statute of 31 H. 8. and conveys title to himself, and that he was and still is seised in fee of the lands in question, *et habuit et habet in propria manu*, and therefore ought to be discharged of tithes; and sets forth the statute of 2 & 3 E. 6. that no one shall be compelled to pay tithes, who has a lawful discharge; and that nevertheless the defendant sues him in the spiritual court for tithes, &c.

Noy argued for the defendant.—Here are two discharges pleaded; the one by order; the other by prescription; the one is *manibus aut sumptibus*; the other is *sumptibus*; and here is a double application of these discharges. In the first place, as to the discharge by order, it is to be considered, what discharge those of the order of Præmonstratenses had, and whether it be here well set forth. At first all monks paid tithes as well as other people, until pope Paschal in the council of Mentz ordained, that they should not pay tithes *de laboribus suis*. And this continued to be a general discharge until the time of H. 2. when Adrian restrained the exemption to three orders, the Cisterians, Templars, and Hospitallers. The discharge of the Præmonstratensian order was made by a bull of Innocent the 3d. which is in the third Book of the Decretals; the words of which bull are larger and more ample than the discharge which the Templars, &c. had. But this bull never was allowed, nor is it mentioned in any of the expositions, neither is it in the Gregorian compilation. And when afterwards in the council of Lateran it was provided, *ne ecclesia nimium gravaretur*, that the privilege of the Templars, &c. should not extend to their farmers; most unquestionably, if the Præmonstratenses had had any such privilege, a provision would also have been made with respect to them, for the church would be equally aggrieved by them. In 34 H. 3. 2. *Membrana* 1. there is a clause, that there were several abbots of the Præmonstratensian order, who asked for the privilege of

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of the Cisterians; and this they would not have done if they had had any privilege, especially a greater privilege (c): and there are several privileges in this bull which never have been allowed; as, that no one should take a palfrey from them; and yet when an abbot of this order did homage, the marshal would take his horse. So, that they *provocentur ad judic'*, and that they should not be cited before an ecclesiastical judge, but of their own order. And the parliament roll of the statute of 2 H. 4. c. 4. proves this(d): the occasion of making that statute appears to have been, that the clergy

(c) *Calthorpe*, who has left us a part of Mr. *Noy's* argument, states him to have cited 54 H. 3. *Membrana* 1. by which it appears, that the abbot of *Cisteaux*, who was the head of the order of the Cisterians, certified, that the *Præmonstratenses* were not of the Cisterian order.

(d) The following are the petition and answer, as they appear on the parliament roll:

" A petition was delivered in parliament touching the order of *Cisteaux*, which, by the king's command, was sent to the commons to be advised thereof, and to declare their advice. The words of which petition are as follows: May it please our most excellent and most gracious lord the king to take into his consideration, that whereas from time whereof the memory runneth not, the religious men of the order of *Cisteaux* of your realm of *England* have paid all manner of tithes of their lands, tenements, and possessions let out to farm, or cultivated and occupied by any other persons than themselves, and also of all manner of tithable things being in and upon the same lands, tenements, and possessions, as fully and entirely, and in the same manner as your other liege subjects of your said realm: and that so it is, that of late the said Religious have purchased a bull of our most holy father the pope, by which our said most holy father has granted to the said Religious that they shall not pay tithes of their lands, meadows, tenements, possessions, woods, cattle, or any other thing whatsoever, though they be or should be let out to farm; any title of prescription, or right then acquired, or that might thereafter be acquired, to the contrary notwithstanding: which purchase and grant are in manifest opposition to the laws and customs of your realm; by reason that divers compositions real and indentures are made between many of the said Religious and others your lieges, for the taking of the said tithes: and also, by reason that in divers parishes the tithes demanded by the said Religious, by colour of the said bull, exceed the fourth part of the value of the benefices within the limits and bounds of which they arise; so that if the said bull should be executed, as well you, most dread Sir, as your lieges, patrons of the said benefices, will in a great measure lose the advowsons of the same benefices: and the consuance, which in this respect belongs, and all the said time hath belonged, to your regale, will be discussed in court christian, against the said laws and customs: in order therefore to prevent the great trouble and disturbance which might arise among your people by the motion and execution of such novelties within your realm; may it please you, by the assent of your lords and commons assembled in this present parliament, to ordain, that if the said Religious, or any of them, put the said bull in execution in any manner, that then he or they who shall so put such bull in execution, be put out of your protection by process duly made in that behalf, and his or their goods be forfeited to you, for God and in works of charity.

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clergy exhibited a bull to the commons, which was a new bull of the pope for certain orders to be discharged of tithes of their lands though taken to farm, and this they said was against the law, and to the prejudice of the patron, and that the examination of the bull belonged to the king, and that therefore it might be avoided. And the clergy would not have done this, if the Præmonstratenses had had such a discharge. But it is objected, that though this bull hath not been allowed, yet it is good. I answer, *Negando quia non obieret quatenus habent vim legis, et quatenus habent vim rationis*; and there is a difference between a general law, and a common and particular sentence, as of a divorce, 11 H. 7. 12. And this is evident from M. 5 E. 1. or H. 1. Rot. 100. in B. R. where queen Eleanor brought a *quare impedit*, and had a writ to the bishop; and in a *quare incumbavit* against the bishop she stated, that she had recovered in a *quare impedit*, and had a writ to the bishop *ad admitendum clericum*; to which the bishop said, that it was ordained in the council of Lyons, that the six months should be computed according to weeks, and not according to the months of the year, and that according to weeks the six months were elapsed before the writ was delivered to him, and he collated: the queen replied, that the writ came to the bishop within the six months of the year, and that she was a lay person, and was not bound by the council; and recovered. And this is also proved by 10 H. 7. 18. and the statute of 21 H. 8. c. 21. It appears too by *Ordericus Vitalis*, fo. 111. that in the beginning of the Cisterians, their governor persuaded them to labour, and they cultivated their own lands, but that the white monks would not labour; and therefore

“ Which petition being read and understood, was answered in the words following:
 “ It is granted by the king and the lords in parliament, that the order of *Cisterci* shall
 “ remain in the same state in which it was before the time when the bulls comprized in
 “ the said petition were purchased; and that as well those of the said order, as all
 “ other Religious and Seculars, of what estate or condition soever they be, who put
 “ the said bulls in execution, or henceforth purchase any such bulls anew, or by colour
 “ of the same bulls purchased or to be purchased, take any advantage in any manner,
 “ shall have process made against them, and each of them, by garnishment of two
 “ months, by writ of *præmunire facias*: and if they make default, or be attainted, that
 “ they be put out of the king's protection, and incur the pains and forfeitures contained
 “ in the statute of provisors, made in the 13th year of king Richard. And further,
 “ in order to eschew many the like mischiefs in time to come, it is agreed, that our same
 “ lord the king shall send a letter to our most holy father the pope, to repeal and annul
 “ the said bulls so purchased, and of himself to abstain from making any such grant
 “ hereafter. To which answer the commons agreed, and that it should be made into a
 “ statute.” Rot. Parl. 2 H. 4. No. 41.

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there was greater reason, that the black monks who did labour should be discharged of tithes, than that the idle white monks should. And by their institution the black monks were not capable of appropriations, because they thought the tithes of right to belong to the vicars. In the *Chronicles of Normandy*, fo. 187. the number of black monks and of their abbies was certain; but there was no certain number of white monks; so that it was a greater grievance to the church that the white monks should be discharged, than that the black monks should be so.

But 2d. the plaintiff in this case does not shew how he is discharged, but only states generally that he is discharged. In 22 E. 4. 46. where one pleads there that he hath a sufficient discharge, and doth not shew how, it is not good: It is objected, that this is an ecclesiastical matter; as in a divorce. I answer, that such matters ought to be pleaded *concurrentibus iis*, &c. It was adjudged in *Slade and Drake's case*, in C. B. that it is not proper to say, that the abbey was discharged, without shewing how; which case was determined by the chief justice: and though a writ of error was brought upon that judgement, yet it would have been affirmed in this court if the parties had not previously come to a compromise.

Supra. 385.

3. The particular discharge is not well alleged: for it is, that the abbot, *ratione præmissorum*, shall be *exoneratus*; and here are two discharges shewn, and therefore it is uncertain. 30 H. 6. 2. 7. H. 7. And it is *quandocunque*, which is a condition, and the plaintiff does not shew, that he has performed it. 37 H. 6. 4. and 9 H. 6.

4. The particular discharge is not well applied: for the discharge is, when he cultivates with his own labour, and at his own expence; if then there be not both, namely, his labour, and his expence, there shall not be any discharge; as, if the lessee cultivates it, and the lessor afterwards enters for a forfeiture: so, where it is let out by halves, as, if it be *colamus*, *partiemus*; there shall not be a discharge in that case. So, those who had their gardens discharged, were not discharged for *hortis conductis*. For privileges of this nature were *stricti juris*; and the plaintiff has not shewn here that he cultivated it with his own labour, and at his own expence.

[The case was argued again in H. 1 Car. by sir John Davis, the king's serjeant, for the defendant, and by Bankes of Gray's Inn for the plaintiff. This report is taken from Calthorpe's manuscripts.]

Davis.—I conceive in the first place that the privilege of being discharged from the payment of tithes in respect of the order of

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Praemonstratenses will not exempt the plaintiff in this case. For privileges of such a nature had their foundation and beginning, either in a general council, which is in nature of our act of parliament; or, in the pope's bull, which is in nature of our letters patents granted by the king; or in a canon or decree, which is in nature of our judgement at common law: and they are not founded upon any grant made by kings or queens of *England*. For it hath been resolved, where the king of *Hungary* granted to the hospital of *St. Stephen's*, that it should be discharged from the payment of tithes; that that grant, not being made by the pope, was not sufficient to exempt the hospital. Which being so, that such privilege must have its foundation either in a council, or in a bull, or in a canon or decree, we are to consider, whether any of these will serve in the case at bar. And I conceive, that they will not. For it is clear that in our law, neither council, nor bull, nor canon, nor decree, will bind here in *England*, unless they have been received and allowed here in *England*, and by such allowance and receipt have been made part of the law of *England*, as we may see by many authorities in the law upon the rule, which saith, *ubi non est condendi auctoritas, non est parendi necessitas*. And in 29 *H. 3. membrana 5. in dorso*, it appears, that the *English* bishops are not compellable against their will to go to a general council; and therefore they cannot be bound, unless they please voluntarily to submit to them, by any regulations that may be made at such council; whence it is, that notwithstanding the council of *Lyons* ordained, that the six months should be reckoned by 28 days in each month, and not according to the calendar; yet, that ordinance not being received in *England*, the common law adjudges, that the six months shall be taken according to the calendar; as we see by 5 *E. 3. Rst. 100.* which precedent is cited in *Catesby's case*, 6 *Rep. 62.* The ordinance of the council of *Lyons*, too, which excludes a *Bigamus* from clergy, was expounded by the statute *de bigamis*, and received according to the purport of that statute, and not according to the letter of the council. And as to the pope's bull, which are of four kinds, *viz.* 1. Excommunication, 2. Provision, 3. Citation, 4. Exemption, we find that our law does not allow any of them. For as to the bull of excommunication, 36 *Aff. pl. 19.* shews, that it was treason in any one who brought it in: and 2 *R. 3. 3 & 4. 22 H. 7. 15. 8 H. 6. 3. 12 E. 4. 15. and 30 E. 3. Excommengement 6.* agree, that a certificate of excommunication under the pope's bull will not work any disability. As to the bulls of provision, it appears by 19 *E. 3. Quare non admittit 7. 12 R. 2. Jurisdiction 18.* and the statute of *Carlisle*, 25 *E. 1.* that they had been received. As to bulls of citation

citation, the statute of 38 E. 3. c. 1. 2. & 3. disallows them. And as to bulls of exemption, notwithstanding bulls of that nature have been allowed in some cases; yet, where they impugn the law of *England*, they are to be rejected, according to 11 H. 4. where it is said, that the pope cannot by his bull alter the law of *England*; and therefore that law having settled, that tithes are payable of all lands, according to 22 Aff. pl. it shall not lie in the pope's power to exempt any lands from such payment. And as to canons and decrees, it appears too that they had not any more favour than councils and bulls: and therefore, notwithstanding there was a canon made, that a bastard *eigne* should inherit, yet the statute of *Merton* proclaimed against it, *quod nolumus leges Angliæ mutari*: and in 10 H. 7. 18. notwithstanding there was a canon that clerks should not be emplaced before secular judges, yet the contrary was in use.

It being then apparent, that neither council, bull of the pope, nor canon, will bind here any farther than they have been received; we are now to examine at what time, and in what manner the privilege in question began. And as to that, the abbey of *Cokerfand* was founded A. D. 1092, which was in the 5th year of *William Rufus*, and before time of memory: the foundation of the order of *Præmonstratenses* was A. D. 1120, which was in 20 H. 1. and the bull of pope *Innocent* 3d. by which the privilege of being discharged from the payment of tithes was granted to them, was A. D. 1188, which was in 34 H. 2. King *John*, on the 14th of *March*, in the second year of his reign, confirmed to the abbot of *Cokerfand* all his rights and privileges; and there was a second confirmation made by H. 3. in the eleventh year of his reign. Now, though this abbey was so founded before time of memory, and there was a bull of the pope, and confirmation by the king; yet these facts are not stated in the count, and therefore no advantage can be taken of them; but the judgement of the court must be directed merely by the discharge which is there set forth, which is, in respect of order, or in respect of prescription. And the discharge in respect of order cannot be any direction to the court, inasmuch as it does not appear, whether such discharge were by council, bull, or canon; and by any thing that appears, our law has not allowed it to this order, and therefore no advantage is to be taken in respect of the order. In 54 H. 3. *Rot. claus. in Turri*, 9. it appears, that there was a complaint made by the order of *Cisterians* against the order of *Præmonstratenses*: and in 2 H. 4. c. 4. and 7 H. 4. c. 6. where mention is made of the order of *Cisterians*,

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no mention is made of the order of Præmonstratenses. And notwithstanding that in the time of pope *Paschal*, which was about the Conquest, it was ordained by the council of *Mentz*, that all religious persons should be discharged of the payment of tithes of their lands, *quandiu proprius manibus excolebantur*; yet, that ordinance was afterwards varied by pope *Adrian*, and a decree made in 19 *H. 2.* that all religious persons, except three orders, *viz.* the Templars, Hospitallers, and Cisterrians, should pay tithes of their lands; and in this decree there is no mention of the order of Præmonstratenses: neither is the order of Præmonstratenses mentioned in the council of *Lateran*, which was *A. D. 1215.* and which excepts the other three orders. All which shews that it was not generally received beyond sea, that the Præmonstratenses were discharged of the payment of tithes in respect of their order; and if not beyond sea, still less here in *England*. And as to the prescription, monks being lay persons, *qui vivebant in solitudine ex sudore vultûs, et ecclesiasticis negotiis miscere non debebant*, according to the council of *Chalcedon*; they were not accounted part of the clergy, nor could they prescribe *in non decimando*, according to the rule, *quod monachi decimis præscribere non possunt, quia habere non possunt*. And it appears too by *Adrian's* decree, and the council of *Lateran*, that hospitals were not capable of tithes. If then the order could not prescribe *in non decimando* before their dissolution, the patentee shall not be discharged of the payments of tithes after their dissolution; and so, consequently, the prescription will not serve their turn without shewing some particular discharge.

2dly. I conceive, that the plaintiff has not applied his case either to a discharge in respect of order, or to a discharge in respect of prescription: for he only shews, *quod gavissus fuit in propriâ manurantiâ*, without shewing that the lands were *in propriâ manurantiâ* at the time when the tithes were demanded. They might too be in his own manurance, and yet not *excoli propriis manibus et sumptibus*; for some one might till them for him, and take a moiety of the profits; and where any one makes title by grant or prescription, he ought to apply it directly, else he shall not take advantage of it, according to the cases of 11 *Aff. pl. 37.* 17 *Aff. pl. 7.* 34 *H. 6. 24.* and 9 *H. 6.* where one justifies for common *quandocunque averia sua venerint*, he ought to shew that his cattle then went in the place, where, &c. And in the *New Book of Entries*, 450, 451, 452. you will see a special application of the prescription; for there it is expressly alleged,

leged, in a case where the like privilege was claimed under the Cisterrians, *quod manibus suis propriis et sumptibus excoluit*.

3dly. I conceive, that the discharge in respect of order and in respect of prescription, makes the plea double, according to the books of 44 E. 3. 3. 10 H. 7. and 22 H. 6. 10.

Bankes contra.—It is evident by the books of 11 H. 4. 37. 69. & 76. 19 E. 3. *Quare non admittit* 7. 24 E. 3. 30. 2 Rep. 47. and 5 Rep. 2. *Quare impedit* 54. that the law of the church received here in England is part of the law of England; and the order of the Præmonstratenses being received here, as appears by 22 E. 1. memb. 8. *Rot. patentum*, where it is stated, that there were twenty-six abbies of this order, and by the statute of *Carlisle*, 35 E. 1. c. 1 & 4. which makes mention of this order; it must necessarily follow, that the privilege which was incident to the order should be also received and allowed. It appears too in the ledger-book of the abbey of *Cokerfand*, that in 12 E. 3. there was a definitive sentence given, that the abbot of *Cokerfand* should hold his lands discharged from the payment of tithes. And notwithstanding the order of Præmonstratenses be omitted in the statute of 2 H. 4. yet that is not any argument at all; for it might be, that that order was omitted, because there was no cause of complaint against it; and the privilege being a privilege *in esse* before the time of R. 2. the statute of 2 H. 4. does not extend to it.

2dly. I conceive, that the abbot and convent are such a spiritual corporation as is capable of tithes in perannuity; and is also capable of prescribing *in non decimando*, as a bishop is, according to 2 Rep. 44.

3dly. There being a demurrer to the count in prohibition, it is confessed, that there is such a privilege belonging to the order of Præmonstratenses, and also that the abbot and his predecessors were discharged of the payment of tithes; for these are matters in fact, of which the demurrer is a confession in fact, according to 34 H. 6. 8. and 10 E. 4. 5.; and then the privilege and prescription incident to the order being true, the statute of 31 H. 8. c. 13. will make it a good discharge, according to *Priddle and Napier's case*, 11 Rep. 14.

As to the objection which has been made, concerning the doubleness of the plea, it is out of the case; for the demurrer is a general one; and the doubleness of a plea, does not make the plea bad in substance, though it be bad in form, according to 37 H. 6. 6. Dy. 170, 171. and 11 Rep. 10. And as to the objection, that the prescription and

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and privilege are not well applied, because a continuance of seisin is not averred, I answer, that it is implied in the count; and farther, that it is not necessary to aver it, where it is shewn in the count that the plaintiff has an estate in fee-simple in him, according to *Comm.* 190. 431. 31 *H.* 6. 10. and 7 *H.* 7. 3. And as to the objection, that the count is bad, because the manner of the discharge is not set forth, whether it was by council, canon, or bull of the pope, I answer, that the manner of the discharge need not be set forth, because the search for it might be infinite: and notwithstanding the law obliges a man to shew the discharge particularly, where it may be shewn without inconvenience, according to 5 *E.* 4. 8. 22 *E.* 4. 4. and 2 *Rep.* 4. yet, where infinite search, or other inconvenience would follow, it does not require it, according to 17 *E.* 3. 11. 26 *H.* 8. 8. 20 *E.* 4. 15. 12 *H.* 4. 23. 19 *H.* 6. 75. *F.N.B.* 41. and 11 *Rep.* 10. and therefore I pray judgement for the plaintiff. —*Sed curia advisatur.*

[*What the determination of the court in this case was, I have not been able distinctly to discover. It should seem, however, that they gave judgement against the plaintiff, upon the informality of the suggestion. For Serjeant Turnor, in a rather imperfect report of this case in manuscript, tells us, "it was said by the court, that the prescription "laid in the abbot and his predecessors for the discharge quando- "cunque propriis manibus, &c. is the material thing, and that on "which the plaintiff might have relied; and that the order and "privilege appertaining to it are not very material: but that there "was a fault in the suggestion; for that the prescription does "not apply, the plaintiff not averring that at the time, for which "the tithes were demanded, the land propriis manibus et sumptibus "excolebat."*]

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Whitton v. Weston.

The lands belonging to the order of St. John of Jerusalem, which was dissolved by 32 *H.* 8. are discharged of the payment of tithes by 31 *H.* 8.

WILLIAM Whitton brought an action of debt upon the statute of 2 & 3 *E.* 6. against Sir Richard Weston, knight, for not setting out tithes; and declared that he was parson of *Merrour* in the county of *Surry*, within which parish the defendant occupied certain lands, which he sowed with corn in 21 & 22 *Jas.* and severed and carried away the corn, which he there raised, without setting out the tithes.

The

The defendant as to part, pleaded, *nil debet*; and as to the residue, he pleaded specially, that *Wm. Weston*, late prior of *St. John's of Jerusalem in England*, was seised in fee, in right of his hospital, of parcel of the lands in question, and that he and his predecessors by reason of their order, time out of memory, held the said lands discharged of the payment of tithes, *quamdiu propriis manibus suis excolebant*: that by a clause in the statute of 31 H. 8. c. 13. the king and his assigns shall hold the lands of monasteries, as freely as the abbots themselves held them: that by a clause in the statute of 32 H. 8. c. 7. none shall pay tithes, who by law, statute, or privilege ought to be discharged: that by the statute of 32 H. 8. c. 24. the Hospitallers were dissolved, and all their possessions vested in the king: that by virtue of that statute, the king was seised thereof, and held the same discharged from the payment of tithes, and that they descended to queen *Elizabeth*, who granted the lands in question to the defendant's grandfather, to hold as amply as the late prior held them; that the defendant is now seised thereof by virtue of the said grant, and at the time for which the tithes are demanded, and continually from thence until the commencement of the suit *propriis manibus et sumptibus excolebat*: that by the statute of 2 & 3 E. 6. no man shall be compelled to pay tithes for any manors, lands, &c. discharged thereof by any law, prescription, or composition real: and that therefore he sowed the land, and carried away the corn, without setting forth the tithes, as it was lawful for him to do.

To this plea the plaintiff demurred generally:

Noy argued for the plaintiff. He contended, 1st. that the prior of *St. John's of Jerusalem in England* and his brethren were not ecclesiastical persons, and therefore their possessions were not discharged from the payment of tithes, either by the statute of 31 H. 8. or the statute of 32 H. 8. 2. That the possessions of the prior of *St. John's of Jerusalem* are not discharged of the payment of tithes in the hands of a purchaser. 3. That the discharge being only special, *viz. quamdiu propriis manibus excoluntur*, such special manner of discharge is not properly applied to the defendant, so that he can be capable of the discharge. As to the first point he said, that although the prior of *St. John's of Jerusalem* and his brethren were religious persons, for that they took the *tria vota substantialia* of poverty, chastity, and obedience, and were dead persons in law, as it appears by 31 E. 1. *Triall* 99. 1 E. 3. 7. 19 E. 3. *Feoffment* 68. 12 R. 2. *Nonhabilitate* 4. the Statute of *Templars*, 17 E. 2. 2 *Rep.* 3. 4. and 21 H. 7. 7. yet they are not ecclesiastical persons, nor ac-

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This state of the pleadings is taken from *Winch's Entr.* 342.

MSS. *Calthorpe*. There is a more diffuse report of this argument in *Godbolt* 392. but, as it is in many passages confused and incorrect, I have given the preference to this sketch of it by *Calthorpe*. There is another account of this argument in *Latch* 89.

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counted in the number of such; though they had the liberties of ecclesiastical persons granted to them by special privilege. For, 1. upon the taxation in 20 E. 1 (e). when all ecclesiastical persons were taxed to the payment of tenths, they did not pay the tenths, as other ecclesiasticks did. 2. In their summons to parliament, they were summoned by a *vobis mandamus in fide et ligeantia*, or *homagio* (f), as in the summons to temporal persons; whereas ecclesiastical persons were summoned by a *vobis mandamus in fide et dilectione*. 3. It was the rule of the prior and brethren of this order *armis se exercere*; which was contrary to the canon and rule of ecclesiastical persons; for they could not meddle with arms. 4. Upon admission into this order, there was no imposition of hands, which was requisite to all ecclesiastical persons. 5. The statutes of 27 H. 8. and 31 H. 8. do not extend to them, and yet they extend to the possessions of ecclesiastical persons; and the commissions which issued between the 27 H. 8. and 31 H. 8. were not to inquire of them. 6. The statute of 26 H. 8. for the payment of first fruits does not extend to them; and yet all ecclesiastical persons are within that statute. 7. The special act of parliament made in 32 H. 8. concerning them, shews that they were of a different kind from other ecclesiastical persons. Not being then ecclesiastical persons, the statute of 31 H. 8. which extends only to ecclesiastical persons, will not extend to them. Besides, the prior of St John of Jerusalem and his brethren not being dissolved before the 32 H. 8. and being a body of more nature than other ecclesiastical persons are, the statute of 31 H. 8. will not extend to them; for that statute will not extend to those, who are dissolved by a subsequent act of parliament, as appears by 2 Rep. in the *Archbishop of Canterbury's case*.

As to the 2d point, he contended, that the privilege would not discharge the possessions from the payment of tithes in the hands of a purchaser; because the discharge was a discharge *ratione ordinis*,

(e) Qu. Whether this ought not to be the 25th of E. 1. as there was no taxation in the 21st of that king.

(f) I meet with but one instance in *Dugdale's Summons*, where the prior of this hospital was summoned among the temporal lords, and that is in 14 H. 8. fo. 493. But several instances occur, where he is expressly named as being summoned by the very same form of summons as was written to the Archbishop of Canterbury and the other spiritual lords; as in 49 E. 3. fo. 2. 23 E. 1. fo. 8. 21 E. 3. fo. 229. 1 R. 2. fo. 294. 31 H. 6. fo. 447. 38 H. 6. fo. 455. 9 & 10 E. 4. fo. 469.

which

which was personal, and would not extend to any other persons than those of the order.

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As to the 3d point, he contended that the discharge was not properly applied to the defendant; because, though it appeared that the lands were in his manurance when they were sown; yet, it did not appear that they were so when the tithes were taken away, nor when they were due. And farther, it did not appear that the grain with which the land was sown, was the proper grain of the purchaser.

Crawley serjeant, for the defendant, contended, as to the first point, that the prior of *St. John of Jerusalem* and his brethren were both religious and ecclesiastical persons: for they had appropriations, tithes, and other ecclesiastical privileges, of which none but ecclesiastical persons were capable: and they always set forth in pleading, that they were seised *in jure ecclesiæ*, which could not be of any other than ecclesiastical persons. And in proof of this he cited 3 E. 3. 11. 42 E. 3. 22. 35 H. 6. 56. 22 E. 4. 42. 26 H. 8. c. 3. 27 H. 8. c. 10. 44 Aff. pl. 9. and 31 E. 1. Trial 89.

As to the 2d point, he insisted, that the possessions of the prior of *St. John of Jerusalem* and his brethren were discharged of the payment of tithes in the hands of a purchaser; for that this privilege is a real discharge, and is a discharge by way of prescription time whereof, &c. of which a purchaser shall be as well capable by the statutes of 31 H. 8. and 32 H. 8. as the prior and his brethren themselves. And although it was only a personal privilege, yet it might well enough be transferred by act of parliament, according to 3 E. 3. 11. and 35 H. 6. 56. And the cases of *Quarles and Spurling*, P. 44 Eliz. Rot. 944. in *B.R. of Urry and Boyer*, Tr. 8 Ja. Rot. 1941. or 2491. in *C.B. and the lord Darby's case*, Tr. 38 Eliz. Rot. 4. and 10 Eliz. Dy. 277. were vouched. And he said, however the case of *Quarles and Spurling* was adjudged, yet the lands at this day are discharged of the payment of tithes, and no tithes are in fact paid. And in the *New Book of Entries*, 450, in the *Abbot of Fountain's case*, a prohibition was granted, and the possessions were holden discharged of the payment of tithes.

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As to the 3d point, the pleading was ruled to be good the last time the case was argued. The defendant hath well entitled himself to the discharge: for he hath pleaded, that he had the occupation of the lands for one whole year, and that he ploughed, and sowed, and reaped the corn upon the lands at his own costs and charges; and the plaintiff hath admitted all this.

Sir W. Jones mentions that the case was argued at the bar several times.

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Dodderidge J. said, that the prior of *St. John's* and his brethren were ecclesiastical persons, and in reputation taken as part of the church, notwithstanding that *Selden* in his *History of Tithes*, fo. 121, 122. says, that it was adjudged in the court of *Aides* in *Paris*, that they were not any part of the clergy. It appears, too, from the statute of 2 & 3 *Mar. c. 8.* and *Dy. 255.* that colleges are a lay corporation, and not part of the clergy.

This report of the argument is taken from Sir *Wm. Jones's Reports*, 182.

The case was argued in *Tr. 4 Car.* by the four judges. The main question upon the matter in law was, whether these lands were discharged from the payment of tithes or not, either by the statute of 31 *H. 8.* or by the statute of 32 *H. 8.* or by both together?

Whitlock held, that the lands were not discharged, neither the one way, nor the other. *Hyde* C. J. held, that they were discharged by 32 *H. 8.* and not by 31 *H. 8.* *Dodderidge* and *Jones* held, that they were discharged by the statute of 31 *H. 8.* and admitting that the statute of 31 *H. 8.* does not discharge them, yet the statute of 32 *H. 8.* did. So that upon the matter, three judges were of opinion for the defendant, and *Whitlock* only for the plaintiff.

They all agreed, that the case, though it was not great in the particular in question, yet, in the general, it was a question of great consequence, and concerned all the possessions of the Hospitallers, which were very large. Therefore it was requisite that it should be discussed with great deliberation, which they had done.

The questions were four. 1. Upon the statute of 31 *H. 8.* 2. Upon the statute of 32 *H. 8.* The two questions on the statute of 31 *H. 8.* were, 1. whether this corporation was a religious and ecclesiastical corporation, and so in regard of its nature within the statute of 31 *H. 8.*? and 2d. (which was the greatest question) whether the clause of exoneration from tithes, which was given by the statute of 31 *H. 8.* should be extended to these lands, which were given to the king by the statute of 32 *H. 8.* and not by 31 *H. 8.*?

The two questions upon the statute of 32 *H. 8.* were, 1. as the Hospitallers were dissolved by 32 *H. 8.* and all their possessions, hereditaments, and privileges given to the king, whether this privilege, which the corporation had, of being discharged from tithes, was given to the king or not?

2d. Admitting that it was given to the king, whether it extends to the king's patentees and assigns, or not? the words of the statute being, that the possessions and privileges were given to the king, his heirs and successors, and not to his assigns by special name.

Dodderidge, Jones, and Whitlock, argued that this corporation was a religious and ecclesiastical corporation within the words of the 31 H. 8. *Dodderidge and Whitlock* spoke at large and very well, from history, the canon law, and the constitution of the church, of the origin, nature, and condition of this corporation, and shewed that it was first introduced into this kingdom about 1140. See the case of *Sutton's Hospital, Matthew Paris, and Camden's Britannia*, in the description of *Middlesex* (g). The three judges agreed, that it was at first a religious order; that they were professed; bound to obedience, chastity, and poverty; assumed a religious habit; and were disabled from purchasing lands, 1 E. 3. 9. unless in their politick capacity. To plead that the party was professed, and of the order of Templars, was a good plea. In 31 E. 1. *Fitzb. Triall* 98. 99. it was pleaded that the party was professed in the order of St. John's of Jerusalem; and a good plea: and 12 R. 2. *Fitzb. Non-habite* 4. the like plea holden good; and there it appears, that there was a woman of this order. In 19 E. 3. *Fitzb. Feoffments, &c.* 68. and 19 Aff. pl. 9. a commander (who was under the obedience of the prior) could not make a feoffment, because a dead person in law. And 22 R. 2. *Fitzb. Trespas* 33. (b) it appears, that there was an abbot of this order, who was a person dead in law, and religious. And the profession shall be tried by the country; for they were exempted by the pope from the visitation of the ordinary; and the court cannot write to the pope; so that it must be tried by the country. 2 R. 3. 4. 22 H. 7. 7. 31 E. 1. *Fitzb. Triall* 99. See the case of *Martin Docwra* (i), 27 H. 8. 14 b. which proves that they are dead persons in law. The statute of their dissolution makes this clear also; for there they are several times called *religious*, and are discharged of their order, and made capable of suing at common law, and of purchasing. But, though the brothers could not sue at common law, because they were persons dead in law; yet the prior could sue, which see in 32 H. 8. 5. and, *F. N. B. tit.*

(g) It appears from *Calthorpe's* report of this argument, that *Favine's* "*Theatre of Knighthood and Honour*," and the "*Catalogus gloria mundi*," were also referred to.—There is an enumeration of the writers, who have given the history of this order, in *Fabricius, Bibliograph. Antiquar.* p. 465. but it is said not to be complete. The best and most recent history is that of the *Abbé Vertot*. See also *Helyot's Hist. des Ordres*, tom. iii. p. 72.

(h) Qu. For there is no such case under this *placitum*, nor is the 22 R. 2. once referred to in this title.

(i) The name of the prior, who was summoned to parliament in 14 H. 8. was *Thomas Docwra*.

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Sine assensu capituli. 42 E. 3. 22: and 44 E. 3. 16, and in many other books.

It is also ecclesiastical, for that is the genus ; and the species are either religious or secular, and though they were not in orders, and clerks, yet they were ecclesiastical ; for they were under the visitation of the pope, and derived their original foundation from him, as it appears in the statute of 32 H. 8. They are therefore ecclesiastical, for he never claimed any power but over ecclesiasticks. In E. N. B. 194 K. there is a writ *De sine assensu capituli* given to the prior for lands which he claims to be the right of his church : this therefore is a further proof that they were ecclesiastical. And by Jones, no one can claim a discharge of tithes, but an ecclesiastical person, 2 Co. *Wright's case* ; and no one is capable of an impropriation, but an ecclesiastical person, *Grendon's case in Comm.* : and this corporation was capable of both, and therefore must have been an ecclesiastical corporation : and by 26 H. 8. it shall pay first fruits, and tenths, as an ecclesiastical person. And by Jones, though the order were founded by the pope, and had their rules and habits from him ; yet they were not capable of taking land, or of suing, or being sued, but by prescription, the king's patent, or by act of parliament ; for that was a temporal power, which could not be derived from the pope, nor could he (even when he usurped power here) enable any corporation to sue or be sued. This is evident from 9 H. 6. 16. where the king licensed one to found a chantry, and exception was taken, because there was no licence from the ordinary ; *Et non allocatur.* And these three judges concluded, that it was a religious and ecclesiastical corporation within the statute of 31 H. 8. and that it must be both ; for if it was ecclesiastical only, and not religious, it was out of the statute, as it appears from the *Archbishop of Canterbury's case*, in 2 Rep. But Hyde said nothing, nor did he deliver any opinion upon this point, because he held upon the second point, that the statute of 31 H. 8. did not give any discharge.

As to the 2d point upon the statute of 31 H. 8. *Whitlock and the Chief Justice* argued, that the lands were not discharged by the 31 H. 8. They said, that that statute did not give any lands or monasteries, but settled in the king the lands of monasteries dissolved or to be dissolved, as is holden in 1 Mar. 111. and in the *Archbishop of Canterbury's case*, 2 Rep. And as *Whitlock* said, the statute was *bifrons* ; it had relation to monasteries dissolved before the act, and to those to be dissolved afterwards, and their possessions :

quod

quod fuit concessum by all. But they said further, that the intent and words of the statute were merely to give a discharge to those lands only that came to the king by virtue of that act, and not by virtue of any other act: that it does not therefore extend to lands which came to the king by the statute of 27 H. 8. for the dissolution of the lesser monasteries, as was resolved in *Wright and Gerrard's case*, in C. B. 18 Ja. ; nor to lands which came to the king by the statute of 1 E. 6. of Chantries, as was resolved in the *Archbishop of Canterbury's case*; nor to lands which came to the king by the statute of 32 H. 8. as was adjudged, (as *Whitlock* said), Hil. 44 Eliz. in the case of *Quarles and Spurling*, Rot. 994. which commenced in that term, and was so adjudged in 2 Ja. And the words in the clause of discharge in the preamble, and also in the conclusion are "late monasteries," and not generally. And though the purview be general, yet it is qualified by the preamble, and shall have relation to the preamble. It is clear, as they said, that these lands did not come to the king by force of the statute of 31 H. 8. but by the statute of 32 H. 8. solely, and that for two reasons. The first reason was, that they must be lands which came to the king by dissolution, surrender, renouncing, or by any other means: but these lands did not come by relinquishment, by renouncing, or surrender, but by act of parliament; and other means do not include an act of parliament, but must be lower means than an act of parliament. And upon this they cited the statute of *Marlbridge*, which gives remedy to the successors of abbots, or other prelates for the goods of the church taken in time of lapse or vacation, that this does not extend to a bishop. [But note, the successor of a bishop hath nothing to do with the goods of the bishop, for they belong to the bishop's executors.] They also cited a case of 2 Mar. in *Lord Dyer* 109. upon the statute of *West.* 2. which gives the *contra formam donationis* against abbots and other religious men, that that does not extend to a bishop, because he is superior to them. So the statute of 13 Eliz. of leases made by dean and chapter and other ecclesiastical persons, does not extend to bishops: which cases are put in the *Archbishop of Canterbury's case*. 2. They said, that supposing that other means do include an act of parliament; yet, when the succeeding statute of 32 H. 8. says, that the lands shall be vested in the king by that statute, that controls the preceding statute of 31 H. 8. for *leges posteriores abrogant priores*, where they are the direct contrary; wherefore they concluded, that the statute of 31 H. 8. does not give this discharge.

Supra 224.

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Dodderidge and Jones e contra.—They said in the first place, that this point never was adjudged, as they found by inquiry. It was in question in C. B. between *Urry and Boyer*, but the court was divided, that is, *Coke and Nicholls* were of opinion, that the lands were subject to the payment of tithes; and *Winch and Warburton*, that they were not. As to the case of *Quarles and Spurling*, though it was adjudged, yet the judgement went upon another reason; for it was not found there by the verdict (which was special) that the lands came by dissolution to the king, nor was there any mention made of the statute of 32 H. 8. and then, if there was not a dissolution, (as happened in that case), the farmer must pay tithes. And after that judgement in *Spurling's case*, and after the division in the case of *Urry and Boyer*, it was made a point in the *Serjeant's case* (k). This therefore proves, that the case was never adjudged: for no adjudged case was used to be put in the *Serjeant's case*, but a point of doubt, which was in controversy. *Dodderidge* said, that the 32 H. 8. was made from necessity, for that this corporation had power to purchase, but not to alienate lands, and that therefore without an act of parliament they could not surrender them. But it seemed to *Jones*, that they were capable of surrendering them; for though it was a great order, yet it was a particular corporation in this country, which had power to sue and be sued, to purchase and to alien; 32 H. 6. 5. And the statute of 33 H. 8. c. 5. in Ireland proves this: for there it appears, that, before the making of that statute, the prior of St. John's of Kilmainham had made a surrender to the king. But the true reason, as *Jones* thought, was, that they were beyond the sea, and would not surrender; and being abroad they could not be compelled to surrender, as appears by the preamble of 32 H. 8. *Dodderidge* said too, that these words "other means whatsoever," include an act of parliament; for there were no other means to convey the land to the king but by act of parliament, and such means as are particularly mentioned in the statute of 31 H. 8.:

(k) I presume, that the *Serjeant's case* here alluded to is the case supra 281. Since that part of the work was printed off, I have discovered the pleadings in that case in *Winck's Entr.* 197. This shews that there really was such a case as that which is there called the *Serjeant's case*; though it should seem from what Mr. Justice *Jones* here says, and from what is said by my lord Nottingham in the duke of Norfolk's case, *pa.* 31. 32. that the cases which, in general, went under that name, were rather points of doubt and difficulty, proposed to the serjeants as subjects of discussion and amicable contention, and for the exercise of their wits, than any cause then actually depending for the judgement of the court:

therefore,

therefore, as he thought, this dissolution by 32 H. 8. is within the words "other means," and so within the words of 31 H. 8. *Jones* said, that because this point was otherwise determined in the *Maidstone case*, he had submitted to it; but, he said, that if the statute of 31 H. 8. had dissolved the corporation, and had said nothing further, in that case, this dissolution had been within the express words of 31 H. 8. not indeed within the words "any other means," but within the word "dissolution;" for the word "dissolution" includes dissolution by act of parliament, as well as by surrender or other means; and therefore, if the statute of 32 H. 8. had only made a dissolution of the corporation, and not enacted that the lands should be vested in the king by that act, they would have been in the king by the statute of 31 H. 8. but, because the statute of 32 H. 8. says precisely, and enacts, that the lands shall be vested in the king, it controls in express terms the vesting by 31 H. 8. and in that point they agreed with *Whitlock*. In 1 Mar. *Bush and Culpepper's case*. The statute of 33 H. 8. c. 2. vests in the king the actual possession of the lands of one attainted: *Culpepper* was attainted by a special act; and the possession was vested in the king by that statute, and not by the 33 H. 8. But they said farther, that though they are not vested by 31 H. 8. but by 32 H. 8. yet the clause of discharge of 31 H. 8. extends to them: and so said *Dodderidge* also. And first they answered the authorities to the contrary, and next the reason; and then they confirmed their opinion with reason and authority. The cases were two, namely, the *Maidstone case*, and *Wright's case* (*Spurling's case* being already answered). As to the *Maidstone case*, the main point upon which the resolution was grounded was, that because the unity of possession was not personal, it was a good discharge within the 31 H. 8. But, as to the point now in question, they came to no resolution upon it (though it be otherwise reported in the case in print). *Fenner and Popham* were of opinion, that the statute of 31 H. 8. did not give any discharge to those lands which came to the king by 1 E. 6. but *Gawdy* (*absente Winch*) *e contra*. *Wright's case* was this: the prior of *Hatfield Bradock*, in the county of *Hertford*, was seised in fee of the impropriate rectory of *Hatfield Bradock* in that county, and also of a farm called *Downhall* in the same county, the priory, being under 200 l. per ann. was dissolved by 27 H. 8. Afterwards king H. 8. granted the farm to the nuns of *Barking*, and upon their dissolution it came back to the king by 31 H. 8. The king granted the rectory to *Trinity College in Cambridge*, and the farm to another person: the

Dy. 100,
pl. 72.

1627.

farmer of the rectory sued the tenant of the farm in the ecclesiastical court for tithes, and he brought a prohibition. It was adjudged by *Hobart, Finch, and Hutton*, against *Warburton*, that a consuetudo should be awarded. In this case these points were resolved by the three judges: 1. That the impropriation was given to the king by the statute of 27 H. 8. though impropriations be not mentioned in it, but all *tenements, churches, tithes, and hereditaments*. 2. If it was not granted and given to the king by the statute of 27 H. 8. then it was not given by the statute of 31 H. 8. for by the dissolution in the 27 H. 8. the body, to which the appropriation was made, was dissolved, and, consequently, the appropriation was gone, as in 2 E. 3. in the case of the Templars; and the statute of 31 H. 8. does not extend but to those appropriations which were not dissolved until after 4 Feb. 27 H. 8. 3. It was agreed that the statute of 27 H. 8. does not *per se* give any discharge from tithes. And 4. That unity of possession perpetual, and beyond time of memory of the lands and rectory, does not *per se* make a good discharge of tithes, without the benefit of the said clause. 5. They resolved, that the clause of discharge in 31 H. 8. extends to those monasteries which were dissolved, but it extends only by way of exclusion to those monasteries which were dissolved after the 4th day of Feb. 27 H. 8. and the resolution as to the last point differs from the case in question; for there it was an absolute exclusion of all abbies, but here there is no such exclusion.

The authorities being answered, it remains to answer the reason, which is no other, than that the equity and intent of a former statute do not extend to a subsequent statute; which is an argument urged in the *Maidstone case*, with a *teste meipso*, without any authority in law precedent to it, to warrant the opinion. And *Jones* said, that this reason is neither good, nor strong; for that in many cases, by the equity and intent of precedent statutes, things ordained by subsequent statutes were aided. *Littleton, tit. Warrantie*, and 38 E. 3. 23. By the equity of the statute of *Gloucester* made in 6 E. 1. a person shall not be barred by a lineal warranty to make title by the statute of 13 E. 1. without assents. 27 H. 8. 29. the statute of *Marlbridge* helps a feoffment by collusion made by the tenant in demesne: 4 H. 7. gives the wardship of *cestuy que use*, if he made a feoffment; this is within the equity of the statute of *Marlbridge*. *Buckley's case in the Comm.* the statute of 27 H. 6. extends to *Wales*, which was united to *England* afterwards by 27 H. 8. and the 21 E. 3. c. 11. the statute of *Acton Burnell*, provides, that if goods

goods be over-valued, the extendors shall answer for it : by 13 E. 1. *de Mercatoribus*, execution is given of land upon a statute-merchant; if the extendors extend the land too high, they shall answer by the equity of the statute 11 E. 1. which was made before it. And 12 Eliz. Dy. 288. 289. a grant of the forfeiture of treason; if another treason be made afterwards, the grantee shall have the forfeiture of that also. The authorities and reason then are answered. And to confirm their opinion, *Jones* said, that the words and intent of the statute do that : the words in the purview are general, namely, "lands of all monasteries and ecclesiastical houses." And though in the preamble and conclusion of the clause, the words are "late monasteries," yet those words shall not be construed literally, but generally, according to the purview, otherwise monasteries afterwards dissolved were out of the statute (for those were not "late"); but it was agreed in the *Maidstone* case, and it is clear, that monasteries dissolved after the statute are within this clause. And for the intent it appears plainly : for if the hospital had been dissolved without a subsequent act of parliament, it had been within the purview of this clause; and when this was done afterwards by an act of parliament, because the brethren were not present to make a surrender, this shall not take it out of the intent (1); for the intent was to extend the clause to all monasteries, &c. dissolved according to the said statute; and those which were in possibility of being dissolved according to it are within the intention of the law. And to prove this, he cited *Priddle and Napier's case*, 11 Rep. an insufficient surrender of a monastery was made, and afterwards the statute of 35 Eliz. aided it : now the lands came to the king by the statute of 35 Eliz. and yet the clause of exoneration from tithes extends to the monastery. A statute was made in Ireland by 33 H. 8. c. 5. and by that statute the priory of Kilmainham and all monasteries there were dissolved, and their possessions given to the king; and this clause applies to both, that is, to the priory and monastery equally; and there was a statute made in Ireland 4 H. 7. that all

(1) This and other parts of the sentence are quite unintelligible in the original; whether I have succeeded in restoring the sense of it, must be left to the judgement of the candid reader. I add the words of the original. "Et pur l'intent il appiert pleinement, car si le dit Hospital ad estre dissolvu, sans subsequent act de Parliament il ad estre deins le purview del dit clause, et quant ceo fuit apres per act de Parliament pur ceo que les freres ne fueront present de faire surrender, car ne ferra ceo deins l'intent; car l'intent fuit pur extender le dit clause a tout Monasteries, &c. dissolvu solongue le dit statute, ou quous ne fueront en possibilite estre dissolvu solongue le dit statute sont deins l'intention du l'ey."

1627. acts to be passed there must be allowed here in *England*. Now it is not probable they would agree, that in *Ireland* these lands should be discharged, and the lands in *England* should not. And they concluded with the 10th of *Elizabeth*, Dy. where the opinion of the chancellor, the two chief justices, and the chief baron and justice *Southcott*, was, that the lands of the hospital of *St. John of Jerusalem* were exonerated from the payment of tithes by 31 *H. 8.*

And as to the statute of 32 *H. 8.* *Whitlock* held, that that does not give the king any discharge from tithes; and if it did, yet it does not extend to the king's patentees. The three other judges *contra*. They all agreed, that this privilege *non solvendi decimas* was given by an ancient council; and by the council of *Lateran* the privilege was explained, that it extended only to those lands which they had at the time when the exemption was granted, and not to lands acquired *de novo*. But, as it appears by the statutes of 2 *H. 4.* and 7 *H. 4.* several bulls were procured against this constitution, and those were made void by the statutes. The nature of this privilege is expressed in *PANORMITAN*, in *capite ex parte de decimis*, in his exposition upon the decretal, namely, *quod istud privilegium non solvendi decimas datur solis Cisterciis, Templariis, et Hospitalariis. 2. Ex prædiis quæ manibus suis propriis colunt. 3. Et non de prædiis quæ ab aliis conduxissent. 4. Vel quæ aliis pro certo redditu vel censu locassent. Et istud privilegium est personale: et omnia privilegia personalia non egrediuntur ultra personam.* And this privilege, and all other privileges *certam habens interpretationem*. And *Whitlock* from these grounds framed his reason, that this privilege, being personal, does not go beyond the person to whom it was granted: therefore, when the person, namely, the corporation, was dissolved, the privilege was gone: as in the case of 3 *E. 3.* of an appropriation to the Templars; that corporation was dissolved, and by the dissolution the appropriation was gone also. And by the grant in general of all privileges to the king by the statute of 32 *H. 8.* this particular and personal privilege was not given to the king. The statute of 31 *H. 8.* gives all the privileges of the monasteries to the king; but that was not sufficient: therefore a particular clause was added, not as a gift of the privileges, but, that if the lands were exonerated of the payment of tithes at the time of the statute of 31 *H. 8.* then the king should hold them exonerated of tithes. 2. He said, also, that if this personal privilege was given to the king by the statute of 32 *H. 8.* that extends only to the king, his heirs and successors, and not to the grantees of the king: for it shall be personal in the king,

king, his heirs and successors, as it was in the Hospitallers and their successors.

1627,

Hyde C. J. *Dodderidge and Jones e contra*, that by the statute the privilege was given to the king. This immunity, which the Hospitallers had, was a privilege within a privilege, and *privata lex*, or *privatio legis*, an exemption from the general law, which was, that every one should pay tithes. It is true, that a privilege does not extend *ultra personam*, and if the corporation be dissolved, the privilege will be so likewise: but, since an act of parliament gave this privilege to the king before the corporation was dissolved, the king shall have it as a grant to him by act of parliament. And *Jones* compared this case to the case of the appropriation; if the corporation is dissolved, the appropriation is gone, as appears in the said case of 3 E. 3. And *Dodderidge* said, that when the Templars were dissolved, their privileges were gone by the dissolution; but their lands reverted to the patrons and lords of whom they were holden: but by 17 E. 2. those lands were given to the Hospitallers; and though (as it appears by the said council of *Lateran*) of lands *de novo acquirend'* tithes ought to be paid; yet of this land, which the Templars purchased (though it was *de novo acquisit'*) they should not pay tithes, because they enjoy the same privilege. Which proves, as he said, that a privilege, though personal, may be transferred to another. But *quære* of that; for not a word of privilege is in the act. But, if an appropriation be given to the king by an act of parliament, before the corporation is dissolved, there it is good, as was resolved in *Wright's case* aforesaid, 8 *Ja.* But, if the corporation be first dissolved, and thereby the appropriation gone; there, a general grant by an act of parliament will not save it, as it was holden in the same case: though by special words it might be; for all appropriations annexed to monasteries dissolved after 4 *Feb.* 27 H. 8. and before the 31 H. 8. were gone, but by a special clause in 31 H. 8. they were revived, namely, that the king should have the impropriations in the same plight as they were at the day of the dissolution of the monasteries; and then the appropriations were *in esse*, and not determined. In the same manner for these privileges; if the corporation had been dissolved first, and then all privileges given generally to the king by the statute of 32 H. 8. the king would not have this privilege: but, since it is given before the corporation* was gone, the grant is good enough: and though the king shall not have the privilege *idem numero*, yet he shall have it *idem specie*, that is, the king shall hold the lands discharged, as the

* Privilege in the original.

1627.

Hospitallers held them : he shall have such privileges as the Hospitallers had ; as in the case of 20 E. 3. *tit. Avowrie*, and the case of the abbot of *Strata Marcella*, where the grantee was to have *tot, talia, &c. libertates, privilegia, &c. quot, qualia, &c. dictus nuper abbas tenuit, &c.* they are not *the same* liberties, but *such* liberties. And the objection upon the statute of 31 H. 8. for the addition of the clause of discharge, is of no force : for that was *ad majorem cautelam*, and it was also to give a discharge in other cases, than in the case of privilege, namely, in case of discharge by prescription, composition, or perpetual unity, and other discharges. 2. This exemption will extend to the patentees ; for it is not a personal privilege in the king, but a real discharge of the land given by the statute, which goes with the land, into whose hands soever the land shall fall ; for the privilege is *quamdiu propriis manibus excolunt* ; and when the king grants over, it shall be *propriis manibus* of the patentee, as it is resolved in 10 Eliz. And because the three judges agreed, that the lands in question were discharged, judgement was given against the plaintiff, and for the defendant.

Hil. 1 Car. A. D. 1627. B. R.

Mountford v. Sidley. [3 Bulstr. 336.]

This state of the pleadings is extracted from *Croke's report* of the case in the Exchequer Chamber,

IN an action of trespass for the taking of three loads of oats, the defendant in his bar saith, that the place where, &c. is parcel of a copyhold in T. and makes title to it, and justifies for damage-feasant. The plaintiff replies, that long before, and at the said time when, &c. he was parson of T. and that the place where, &c. is within his rectory and the tithable places thereof ; and that the defendant, being a copyholder there, let it to one *Hawkes*, to hold it from year to year, as long as both parties should please, and that *Hawkes* entered and ploughed and sowed and took the crop, and set out the said oats for his tithes ; and that the defendant of his own wrong took the said oats at the said time when, &c. The defendant rejoins, and protesting that the oats were not set forth for tithes, traverses the demise to *Hawkes*. To this traverse the plaintiff demurred.

* *Jon.* 89.
S. C.

Whitlock justice.—The traverse is not good, and, upon consideration of the whole matter, judgement ought to be given for the plaintiff. The defendant hath admitted, that the plaintiff was parson ; and hath also admitted, that the oats were set out for tithes,

and

and that he took them. The case is no other than this; that corn is set out for tithes, and the owner of the land takes it as damage-feasant, without making it to appear in pleading (as he ought to have done) that the parson had suffered the corn to remain over-long upon the land to his damage. The parson may have an action of trespass for the taking away, if once they were set out for tithes, and after taken away. The defendant here disclaims any title to, or property in, the corn; he claims nothing in it, but he admits the plaintiff to have the sole property. Where he disclaims for damage-feasant, he ought specially to shew, that the same remained there so long, that by it there was a damage to him; and lawful it is in such a case to distrain corn in the shocks; but not so for rent; and so the difference is taken 10 *H. 7.* 21 *H. 7.* and 22 *E. 4.* 50. As to the traverse here taken, it is not a material traverse, and so for this cause not good, the same being *absque hoc* that *Sidley* demised unto *Hawkes* for one year; which is no way at all material. He needs not to take notice of his title in an action on the statute of 2 & 3 *E. 6.* for not setting out tithes: he is not to lay and set forth a title in the defendant: he needs only to state, that he was possessed without shewing any title, and that is sufficient. Here the defendant by his traverse admits the plaintiff to be parson; so that the traverse is not good, and judgement ought to be given for the plaintiff.

See the latter statutes contr.

Jones justice.—It doth not appear here in the declaration, whether the plaintiff hath brought his action, as parson, or otherwise; and therefore the defendant might well plead in bar, for the parson ought to make his title. The parson, where tithes are set out, hath a liberty for a time convenient to come and carry them away, and this conveniency of time is triable by a jury. And this is a licence, which the law gives him, and if he exceeds it, he shall be subject to an action, and then, by the judgement of law, he shall be taken for a trespasser *ab initio*. Otherwise it shall be of a licence in fact, given by the farmer himself; if he exceeds this, no action of trespass lies for it, but an action on the case; and this difference is taken in *The Six Carpenters case*, 8 *Rep.* 146. If an action is brought for taking away tithes, the defendant ought to plead specially, either that they were not set out for tithes; or, that being set out, they were suffered to remain there over-long. Here the parson makes his title in his replication. As to the traverse by the defendant of the demise to him who set out the tithes, this is a bad and an impertinent traverse. If one, who has some colour of title,

low

1627. fow the land, and set out the tithes, though he be a disseisor, this is good for the parson: otherwise it is, where one without any colour sets out tithes; this is no setting out in law. Here the traverse being of a particular inducement to the title is not good; and the traverse being bad, judgement ought to be given for the plaintiff.

Dodderidge justice.—The traverse is bad both for the matter and the manner of it. As touching a traverse, that thing is to be traversed, which goes to the point of the action; any other traverse is not good, because not material. To the title of the plaintiff here, the demise to *Hawkes*, be it for one year, or for half a year, is not material; and for this cause the traverse is not good. The defendant might have said, that the plaintiff was not parson; or, that it was not in his parish; or that it was not severed from the nine parts. If any of these were so, the same would have well served his turn, and a material traverse might have been upon any of these. But here he hath traversed a thing merely immaterial. As to the manner of the traverse; the traverse is here also void for the manner of it; for he hath here traversed a conveyance only, and nothing else; and this is not good. He doth here traverse only the conveyance to the title, which enables him to have the tithes, and therefore this traverse is not good. Also, the traverse is not good, because he hath here taken a captious traverse, the same being *absque hoc*, that he demised to *Hawkes* for one year. So that, upon the whole matter, the traverse is bad both ways, both for the matter and the manner of it; and therefore judgement ought to be given for the plaintiff.

Crew chief justice.—The defendant hath here allowed a good title in the plaintiff to the oats. If it appears by the declaration, that the plaintiff was parson, then by the bar the defendant ought of necessity to shew the cause of his taking for damage-feeant. But here, as this case is, he needs not do it, because the plaintiff does not bring this action, as parson; but in his replication makes his title, as parson. The traverse here is not good. If the corn had continued there over-long, the defendant's remedy had been by action on the case. But, here, no title appears but only for the plaintiff. So the traverse is bad, and judgement ought to be given for the plaintiff.

Cro. Car.

Upon this judgement a writ of error was brought; and the error assigned was, that the plaintiff alleged, that he was parson *tempore quo*, &c. and at the time of the trespasses supposed, *ac diu antea*; but

but did not say, that at the time of the severance of the corn he was parson; for it shall not be intended without shewing it; but rather, that he was parson at the time of the trespass, and not at the time of the severance, and then he made not a sufficient title to the tithes. But all the justices and barons conceived it was well enough; and it shall be intended by all the circumstances, that he was parson at the time of the severance; for it is said, *antea et tempore quo fuit parson, et adhuc est, &c.* and especially the defendant having admitted that he was parson, and the said tithes due unto him, and making a traverse of the lease, which was an idle traverse, and therefore good cause of demurrer. And the replication is good; for being pleaded that *diu antea et tempore quo, &c.* he was parson, it is certainly enough intended, he was parson at the time of the severance, as well as at the time of the taking. Whereupon judgement was affirmed, notwithstanding the book, 35 H. 6. 48. which was much insisted upon.

H. 2 Car. A. D. 1627. C. B.

[Littlel. Rep. 13.]

A LIBEL was in court christian for tithes of hay: the defendant said, that the hay was growing upon headlands and butts in corn fields: and it was agreed by *Hutton* and *Yelverton*, who were the only judges then in court, that a prohibition should be granted: for the defendant is discharged of tithes in this case of necessity. This part is left for the turning of the plough, and is part of the ploughed land, of which the parson has tithe of corn, and he could not plough his land, if it were not left. And this is the reason of the case of 22 E. 4. 8.

A libel was in the ecclesiastical court for tithes of rabbits, which the party killed only for his family. And it was agreed, that tithe shall not be paid for rabbits killed to be eaten in the house, any more than for fat cattle fed, and killed for the house, and therefore a prohibition was granted. So in the next term it was agreed, that no tithes are due for conies by the common law, but only by the custom of the place.

Per Richardfon arguendo.
No tithes due for hay from headlands in corn fields.

No tithes due of rabbits killed for the use of the owner's family; nor of acorns eaten by his pigs.

1627

Tr. 3 Car. A. D. 1627. C. B.

Anon. [Littlet. Rep. 40.]

Tithes are not due of pigeons eaten in the owner's house, nor of acorns eaten by his pigs. See *Flower v. Vaughan*, *Hall*. 147. S. P. as to pigeons.

A PARSON libelled in the spiritual court for tithes of pigeons and acorns; and the defendant prayed a prohibition, because the pigeons were expended in his own house, and the acorns dropped from the trees, and his pigs eat them. By the court—Acorns are tithable, 11 *Rep.* 49. But then they ought to be gathered and sold. And a prohibition was granted.

Tr. 3 Car. A. D. 1627. Cam. Scac.

Norton v. Clarke. [MSS. Calthorpe.]

The tithe of woad is a predial tithe. But Qu. Whether an action on the statute of 2 & 3 *E. 6.* will lie for not setting it out.

A WRIT of error was brought in the exchequer chamber for the reversal of a judgement for *Clarke* in an action by him against *Norton* upon the statute of 2 & 3 *E. 6.* The first error that was assigned was, that there was no averment that the tithes in question had been paid by the space of 40 years according to the words of the statute, which require that "every of the king's subjects shall from henceforth truly and justly without fraud or guile divide, set out, yield and pay all manner of their predial tithes in their proper kind as they rise and happen, in such manner and form as hath been of right yielded and paid within 40 years next before the making of this act, or of right or custom ought to have been paid;" and if they were not paid, or of right ought not to have been paid within 40 years next before the making of the statute, then an action upon the statute will not lie.

The second error that was assigned was, that an action of debt upon the statute would not lie for tithes of woad, because woad, according to *Speed*, in his *Chronicle*, is but an herb, and so in the nature of a small tithe, for which an action of debt upon the statute will not lie. For an action of debt will not lie for tithes of onions, radishes, &c. though they grow in a field; for they are small tithes, In *M.* 18 *Ja.* in the case of *Payne and Nicholson* it was adjudged, that an action of debt would not lie for the tithes of wool and lamb, And *Sir Thomas Crewe*, the king's serjeant, said, that tithes are great or small *secundum quid*. For in some places those tithes may be said to be great tithes, which in other places are small tithes,

Where

Where the title of a thing is *magnus ecclesiæ proventus*, there, it shall be reckoned among the great tithes: but, where it is *parvus ecclesiæ proventus*, it shall be a small tithe. And therefore in *France* the tithe of grapes is reputed among the great tithes, because it is *maximus ecclesiæ proventus*; whereas in *England* the tithe of grapes is reckoned among the small tithes, because it is *parvus ecclesiæ proventus*. And in the case at bar, because woad is not a thing frequently nor generally sown, it cannot be said to be *magnus proventus ecclesiæ*, and therefore is to be ranked among the small tithes. Upon a special verdict in one *Tyndall's case* in *C. B.* it was adjudged, that the tithe of woad is a small tithe, and that it belongs to the vicar. And some tithes which *ratione speciei* may be predial tithes, and not small tithes, yet *ratione loci* may be small tithes. For which reason if peas, or such sort of grain be sown in a garden, the tithes of them may *ratione loci* be small tithes; whereas if they were sown in a field, they would be said and reputed to be among the great tithes, as being predial tithes.

Binge serjeant e contra.—He contended 1st. that notwithstanding woad was not a thing known at the time of the making of the statute, yet tithes ought to be paid of it, if it be in its nature tithable: for if it had been sown at that time, tithes must have been paid for it: and, therefore, it being sown at this day, tithes shall be paid of it. Saffron was not a thing commonly known at the time of the making of the statute; yet, because it was in its nature tithable, tithes without denial are paid of it at this day; and so, by consequence, the count is good enough without any averment. *Quod fuit concessum per curiam*; for if tithes of right ought to have been paid for a thing, if it had been in being at the time of making the statute, tithes shall be paid of it at this day.

In the next place, he conceived, that the tithes of woad are predial tithes, because it is a plant or herb which arises *ex prædio* and out of the soil; and he found by *Rebuffus* in his 8th question *de decimis*, that it is taken as a general rule, *quod quidquid oritur ex prædio, decimæ ejusdem sunt prædiales*; and of these predial things there are *fructus naturales*, which grow naturally without the industry or labour of man, as grass, fruit, herbs, &c. and *fructus artificiales vel industriales*, to the growth of which the industry and labour of man are requisite, as corn, woad, hemp, flax, &c. And the tithes of each of these are called *decimæ provenientes* & *decimæ fixæ*, because they arise *ex fructibus stirpis in terrâ fixæ*. And there are also tithes of a mixt nature, which are called *decimæ renovantes super terram*;

I 27.

Cro. Car.
28 Hutt.
77. This case cannot be urged as any decision upon the point, the special verdict being so short, so entirely devoid of any circumstance, that the court could not but give judgement for the defendant, the vicar.

1627. as the tithes of wool, lamb, calves, &c. for they receive their aliment and nutriment from the earth and the fruits of it, though the things whereof the tithes are demanded do not proceed from the earth. And of these predial and mixt tithes, the tithes shall be said to be great or small *ratione temporis et ratione loci*; for prescription and the usage of the place may make those tithes to be great tithes, which had otherwise been small tithes. There are also personal tithes, which are tithes proceeding from the labour and industry of a man, as the tithes of the fees of a lawyer, physician, attorney, &c. or of a man's salary. These tithes follow the person, and are neither *decimæ exeuntes de terrâ*, nor *decimæ renovantes super terram*. The tithes of fish in a river are said to be personal tithes, because *mutant locum* from one place to another, and are not circumscribed to any place certain: but the tithes of fish in a pond are predial, for they are circumscribed in a place certain, *et non possunt mutare locum*. And there is a difference in many respects between predial, mixt, and personal tithes: for predial and mixt tithes are to be paid, whether the possession of the things, whereof the tithes are demanded, be just or unjust: but personal tithes are not to be paid but *per justum possessorem*: and therefore tithes are not to be paid of a harlot's hire, or of gains made by robbery, or other illegal courses: for such is *turpe lucrum*, which is hateful to God and man. Predial and mixt tithes are to be paid *sine deductione expensarum*; whereas personal tithes are to be paid *deductis expensis*. There cannot be a prescription *in non decimando* concerning predial and mixt tithes, unless it be a prescription by an entire country; but there may be a prescription *in non decimando* concerning personal tithes. And debt upon the statute of 2 & 3 E. 6. will not lie for not setting out personal tithes, as it will for the non-payment of predial tithes, and of tithes of woad, which are predial.

Walter, Hutton, and Harvey, justices, were of opinion, that the tithes of woad are predial tithes.

The case was argued again in the following term; and it was agreed, 1st. that no tithes are tithes within the statute of 2 & 3 E. 6. for the subtraction of which an action upon that statute will lie, but predial tithes. 2. It was agreed, that the tithes of woad are predial tithes, *nam oriuntur ex prædio*; and therefore they cannot be other than predial tithes, according to *Doctor and Student* 69. And *P. 1. Ja. Rot.* 1119. *Cooke and Southby's case*, in *C. B.* it was resolved, that tithes of apple-trees are predial tithes, and that debt upon the statute of 2 & 3 E. 6. lies for the subtraction of them. 3. There was a difference

difference of opinion, whether an action of debt upon the statute of 2 & 3 E. 6. would lie for not setting out such predial tithes as are in their nature small tithes. And the better opinion of the justices and barons was, that an action would well lie. However, as *Hutton, Harvey, and Walter*, seemed to be of a contrary opinion, it was adjourned for that point.

3 Car. A. D. 1627. In Ch.

Yate v. Southby. [1 Ch. Rep. 25.]

A BILL of review brought to reverse a decree for tithes made by the lord *Ellesmere*, in respect the plaintiff hath had a verdict at law, and sentence in the ecclesiastical court, since the decree; this court could not reverse the decree, notwithstanding any thing urged against it.

Chancery refused to reverse a decree for tithes.

4 Car. A. D. 1628. In Ch.

Browne v. Thetford. [1 Ch. Rep.]

THE bill is to maintain the prescription of a *modus decimandi*, to which the defendant demurred, and says it is proper for the common law, or the ecclesiastical court. This court allowed the demurrer, and dismissed the bill. But note the time, &c. such bills having been often allowed, both before and since.

Demurrer to bill for the prescription of a *modus decimandi*, allowed. 1 Chanc. Rep. 27. But *quære*, &c. *ante* & *post*.

H. 4 Car. A. D. 1628. C. B.

Scot v. Wall. [Hob. 247.]

THE plaintiff had a prohibition containing, that where he had 20 acres of wheat, and had set out the tenth part of it, the defendant pretending, that there was a custom of tithing, that the owner should have forty-five sheaves and the parson five, had sued for that, whereas there was no such custom: but the court said, that the *modus decimandi* must be sued for in the ecclesiastical court, as well as the very tithe, and if it be allowed between the parties they shall proceed there; but, if the custom be denied, it must be tried at the common law; and if it be found for the custom, then a consultation must go, otherwise the prohibition standeth.

A *modus* must be sued for in the spiritual court as well as the tithe in kind. *Hutt. 133. S. C. Noy 81. 2 Vent. 239. S. P.*

H. 4 Car. A. D. 1628. C. B.

Farmer v. Shereman. [Hob. 248.]

THE case in prohibition was, that an abbot having a privilege to be discharged of tithes *quamdiu manibus propriis* in the time of E. 4. made a gift in tail, and 31 H. 8. the abbey was dissolved. The

Disines demanded of abbey lands, contained before the statute 31 H. 8. *Hutt. 133. S. C.*

1628.

question was, whether the donee of the issue should be discharged. It seemeth clear he shall not be discharged; for the statute dischargeth none, but as the abbot was discharged at the time of the dissolution; so that they must claim the estate and discharge under the abbot, since the statute. So, if by a common recovery the reversion had been barred before or after the statute. But, if the land had returned to the abbot or king, before or after the statute, the case had been otherwise.

H. 4 Car. A. D. 1628. C. B.

Napper v. Seward. [Hob. 248.]

Prohibition
to a suit in
the ecclesiastical
court to make
proof of a
custom of
tithing in *perpetuum rei memoriam*.

NAPPER against *Seward* a parson, had a prohibition against his parishioners, that libelled in the spiritual court to make proof by witnesses thereof divers manner of tithing, in *perpetuum rei memoriam*. A strange attempt!

H. 4 Car. A. D. 1628. C. B.

Hild v. Ellis. [Hob. 250.]

Prohibition
for the second
tithing having
been paid
for the first.
Hild v. Ellis.
133.
S. C.

PROHIBITION for *Hild* plaintiff against *Ellis*, farmer of the rectory of *Slinfield* in *Com. Berk.* and prescribed, that all tenants and occupiers of the meadow had used to cut the grass and strew it abroad called tedding, and then to gather it into winrows, and then to put into grass cocks in equal part, without fraud, and then to set out every tenth cock great or small to the parson, in full satisfaction, as well of the first, as of the latter making; upon traverse of the custom, it was found for the plaintiff. And exception was taken that the custom was void, because it contained no more than every owner ought to do, and so no recompence for the second making: but the court gave judgment for the plaintiff. For tithes naturally is but the tenth of the revenue of my ground, not of my labour and industry; where it may be divided; as in grass it may, though not in corn: and in divers places they set out the tenth acre of wood standing, and so of grass: and so here the jury having found this form of tithing to be the custom there, it is well. And the like judgement was given upon the like custom in the king's bench, *P. 2 Ju. Ret.* 191. or 192. between *Hall* and *Symonds*.

END OF VOLUME THE FIRST.

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that proper record-keeping is essential for transparency and accountability, particularly in financial matters. The text outlines various methods for organizing and storing data, including digital databases and physical filing systems. It also mentions the need for regular audits and reviews to ensure the integrity and accuracy of the information.

2. The second part of the document focuses on the role of communication in achieving organizational goals. It highlights the importance of clear and concise communication, both internally and externally. The text provides guidelines for effective communication, such as using appropriate language, being open to feedback, and ensuring that all team members are informed and aligned. It also discusses the benefits of regular communication, such as improved collaboration and faster problem-solving.

3. The third part of the document addresses the challenges of managing a large and diverse team. It acknowledges that managing a large team can be a complex task, requiring strong leadership skills and effective delegation. The text offers strategies for managing a large team, including setting clear expectations, providing ongoing support and training, and fostering a positive team culture. It also mentions the importance of recognizing and rewarding team members for their contributions.

4. The fourth part of the document discusses the importance of innovation and creativity in driving organizational success. It emphasizes that innovation is not just a buzzword, but a necessary component of long-term growth and competitiveness. The text provides tips for fostering innovation, such as encouraging open-mindedness, providing resources for experimentation, and creating a supportive environment for creative ideas. It also mentions the importance of protecting intellectual property and seeking external funding for innovative projects.

5. The fifth part of the document concludes by summarizing the key points discussed throughout the document. It reiterates the importance of accurate record-keeping, effective communication, strong team management, and a commitment to innovation. The text ends with a call to action, encouraging readers to implement the strategies and principles discussed in the document to achieve their organizational goals.







